134-68

TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1888.

No. ~~1071.~~ 724

PRENTISS D. CHENEY, APPELLANT,

vs.

JACOB LIBBY.

APPEAL FROM THE CIRCUIT COURT OF THE UNITED STATES FOR THE DISTRICT OF NEBRASKA.

FILED AUGUST 27, 1888.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1888.

No. 1071.

PRENTISS D. CHENEY, APPELLANT,

vs.

JACOB LIBBY.

APPEAL FROM THE CIRCUIT COURT OF THE UNITED STATES FOR THE DISTRICT OF NEBRASKA.

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1 Pleas before the Honorable David J. Brewer, judge of the circuit court of the United States for the eighth judicial circuit and district of Nebraska, at the term of November, A. D. 1887.

Be it remembered that on the 26th day of February, 1887, a bill was filed in the office of the clerk of said circuit court; which said bill is in words and figures following, to wit:

In the Circuit Court of the United States for the District of Nebraska.

JACOB LIBBY, Complainant, *vs.* PRENTISS D. CHENEY, Defendant.

To the honorable judges of the circuit court of the United States for the district of Nebraska:

Your orator, Jacob Libby, as complainant herein, respectfully complains and shows unto your honors that he is a citizen and resident of the State of Nebraska; that the defendant, Prentiss D. Cheney, is a citizen and resident of the State of Illinois, and that the matter or property involved in this controversy, as below set forth, exceeds the sum or value of five thousand dollars exclusive of costs.

Your orator further represents that on or about the 28th day of May, 1880, then being the owner and seized in fee simple of the real estate below mentioned, said defendant, Prentiss D. Cheney, made and entered into a contract for the sale of said real estate with your orator, whereby said defendant sold and agreed to convey to your orator said real estate, which is described as follows: All of section twenty-six and all of section twenty-seven, all in township five
2 north of range eight east of the sixth principal meridian, lying and being in the county of Gage and State of Nebraska; said contract was reduced to writing and was, on or about the day last aforesaid, executed and signed in duplicate by both said defendant and your orator, and each delivered to the other a duplicate original of the same. Said written contract provides that the purchase price of said land agreed to be paid to said defendant by your orator and received by defendant from your orator for said lands was eight thousand nine hundred and sixty dollars, to be paid as follows: Sixteen hundred dollars was to be paid at the execution and delivery of said contract and the balance to be paid in ten annual payments, at the times specified, in eighteen promissory notes of even date with said contract, eight of which were for nine hundred and twenty dollars each, and to become due, respectively, in three, four, five, six, seven, eight, nine, and ten years from their dates, and were for the balance of the principal of said purchase-money. The other ten notes were for the annual interest on the unpaid principal and were as follows: First note for $441.60; second note for $441.60; third note for $441.60; fourth note for $386.40; fifth note for $331.20; sixth note for $276.00; seventh note for $220.80; eighth note for $165.60; ninth note for $110.40, and tenth note for $55.20, and due, respectively, in one, two, three, four, five, six, seven, eight, nine, and ten years from their date.

All of said notes, both for principal and interest, were made payable at the office of Russell & Holmes, Tecumseh, Nebraska, without interest before due and with ten per cent. interest after maturity, all of which is also provided in said contract. Said contract further provided that said defendant should pay the taxes on said land for the year 1879 and all prior years, and that your orator
3 should pay the taxes on the same for the year 1880 and all subsequent years, and that your orator should break two hundred acres on said tracts during the year 1880, if the weather would permit, and build a frame house 16 x 20 feet on said land, and also a frame dwelling-house on said lands, one and one-half stories high, during the year 1880. Said contract further provides that in case said Libby should pay or cause to be paid, either by himself or his assigns, the several sums of money as above specified and should do and perform all and singular the agreements and stipulations aforesaid after their true tenor and effect, then said defendant covenanted and agreed to make, execute, and deliver to your orator, his heirs or assigns, a deed conveying said lands to him in fee simple, with the ordinary covenants of warranty, reserving and excepting the right of way which may be demanded for public use for railways or common roads. Said contract further provides that whenever one-half of the purchase price mentioned shall be paid, with all accrued interest and taxes, said Cheney shall execute and deliver the deed as therein contracted for and take notes and a mortgage for the remaining payments, which shall run the unexpired term, as therein fixed. Said contract further provides that said defendant should deliver possession of said land to your orator immediately upon the execution of said contract thereunder. A duplicate original of said contract was duly executed, acknowledged, and delivered by said defendant to your orator on the day first aforesaid, and your orator, on the 26th day of June, 1880, filed the same for record in the office of the county clerk of Gage county aforesaid, and the same was then duly recorded in Book "D" of the miscellaneous records of said county, at page 319, and for greater certainty a copy thereof
4 is attached hereto and filed herewith, marked "Exhibit A," and is referred to hereby.

Your orator further avers that immediately after the execution of said contract as above mentioned he, with the consent of said defendant, took possession of said lands thereunder and in pursuance thereof, and he, together with those claiming under him, has been in actual possession and occupancy of said lands ever since and still is in such possession under said contract. Your orator, during the season of 1880, did all the breaking and built the houses and did and made all other improving of and improvements upon said land mentioned in said contract. At the execution and delivery of said contract as above mentioned your orator paid sixteen hundred dollars of the purchase-money for said land, as mentioned and provided in said contract. Your orator has also punctually paid the taxes of 1880 and of all subsequent years on said land.

Your orator has always and ever since the execution of said contracs punctually paid each note above mentioned and mentioned in

said contract, both for principal of the purchase-money for said land and for interest as the same become due, and in consequence of such payments defendant promptly cancelled and surrendered all such notes maturing on and before May 28th, 1884. On the 28th day of May, 1885, your orator promptly paid the two notes, one for principal and the other for interest, mentioned in said contract maturing on that day, at the bank or office of said Russell and Holmes, where the same were made payable, and demanded said notes, but the same were not surrendered by defendant, but wrongfully retained by him in violation of his said contract, but your orator left the full amount of said notes in cash, at said office of Russell
5 and Holmes, for and to be paid to said defendant when he surrendered said notes, and said amount has remained at said office for said purpose ever since. On the 19th day of August your orator tendered, at said office of Russell and Holmes, to said defendant one hundred and twenty dollars more on said purchase-money, and left the same, in gold coin, at said office for said defendant, to be applied on said purchase-money, and tendered a mortgage on said land to secure the remaining unpaid portion of said notes for principal and interest executed by your orator and wife; and your orator then and there offered to fully do and perform all and singular the other agreements of your orator mentioned in said contract to entitle him to said deed, and demanded a deed, such as is provided for in said contract, conveying said land to your orator from said defendant. Your orator avers that said one hundred and twenty dollars, together — such part of said purchase-money theretofore paid, aggregated one-half of said purchase-money and all interest then due and all taxes due, but said defendant then refused and still does refuse to make and deliver said deed. On the 28th day of May, 1886, your orator paid, at said office of Russell and Holmes, the full amount of the two notes mentioned in said contract, then coming due, in cash and demanded said notes, but defendant refused to surrender said notes then maturing, and said amount to pay same in full was left by your orator, in cash, at the said office, to be paid to defendant on the surrender of said notes, and the same has remained at said office for that purpose ever since.

The aggregate amount of said purchase, so paid as above mentioned by your orator, is largely more than one-half thereof, as mentioned in said contract, and all the interest and taxes due.
6 Said orator has fully done and performed each and every obligation, promise, or undertaking in said contract mentioned to entitle him to said deed; and on the 4th day of February, 1887, your orator again offered to deliver to defendant a mortgage upon said land to secure the unpaid portion of said purchase-money and interest, and offered to fully perform all his obligations in said contract mentioned, and demanded said deed, and on February 7th, 1887, said defendant refused and still does refuse to make and deliver the same.

Your orator further avers that after he took possession of said lands under said contract, with the full knowledge and consent of

said defendant, he began improving the same and since then he has broken out and reduced to cultivation twelve hundred acres of said lands; he has built houses and other buildings thereon; he has built and erected fences, barns, and other improvements thereon, all of a substantial and permanent character and constituting permanent improvements to said land, of the aggregate value of fifteen thousand dollars.

Your orator further avers that unless this court will take cognizance of this whole matter and compel a specific compliance and performance on the part of said defendant with and of his obligations named in said contract your orator will be left entirely without adequate relief.

Your orator hereby tenders and offers to deliver to said defendant a good and sufficient mortgage on said land to secure the unpaid and unmatured notes mentioned in said contract as this court may direct, and offers to fully and specifically perform and fulfill each and every obligation in said contract named necessary to be performed by him as a condition precedent to the execution and delivery of said deed or as may be directed by this honorable court.

7 Forasmuch, therefore, as your orator is without adequate remedy in the premises, except by filing this bill of complaint, he prays that your honors will take cognizance of this whole matter; that said defendant, Prentiss D. Cheney, be required to full, true, and direct answer make hereto, though not under oath, answer under oath being hereby expressly waived; that on a full and final hearing hereof said defendant be, by decree of this court, compelled and required to fully and specifically perform his several agreements, promises, and undertakings in said contract mentioned, and make, execute, acknowledge, and deliver to your orator a good and sufficient warranty deed conveying to your orator said lands, to wit, sections twenty-six (26) and twenty-seven (27), in township five (5) north, of range eight (8) east, in the county of Gage and State of Nebraska, in fee simple, within a short day to be fixed by the court, and that in default of full compliance with said decree within the time fixed by the court that the decree of this court shall stand for and operate and have the full force and effect of such deed; that said defendant be required and adjudged to pay the costs of this suit, and that your orator may have such further order, relief, or decree as to the court may seem proper and as in law or equity he may be entitled to. And may it please your honors to grant unto your orator the most gracious writ of subpœna, to be issued under the seal of this court, directed to said defendant, Prentiss D. Cheney, therein and thereby commanding him, on a certain day and under a certain penalty to be named therein, personally to be and appear before the court, then and there to answer all and singular the premises and to abide and stand by and perform such order and decree therein as to the court may seem meet.

SAMUEL P. DAVIDSON,
Solicitor for Complainant.

8 A. H. BABCOCK, *Of Counsel.*

Attached to said bill is Exhibit "A," in words and figures following, to wit:

"EXHIBIT A."

This indenture, made this 28th day of May, in the year of our Lord one thousand eight hundred and eighty, between Prentiss D. Cheney, an unmarried man, of Jersey county, Illinois, party of the first part, and Jacob Libby, of Mills county, State of Iowa, party of the second part, witnesseth: That in consideration of the stipulations herein contained and the payments to be made as herein specified, the first party doth by these presents demise and let to the second party the possession and use of the land herein mentioned, and also contracts, bargains, and agrees to sell to the said second party said premises, situate and being in the county of Gage, in the State of Nebraska, known and described as follows, to wit: All of section twenty-six (26) and all of section twenty-seven (27), both in township five (5) north, in range eight (8) east, of the sixth principal meridian. The sum agreed upon for the possession, use, occupancy, and control of said land is $1,361.60 yearly, which is represented and included in the notes executed by said second party, described herein, and also the whole amount of the taxes that are or may be assessed against said land. The purchase price of said land is eight thousand nine hundred and sixty dollars, of which payment has been made of sixteen hundred dollars at the execution of this contract. The balance is to be paid, without notice or demand therefor, in ten annual payments, at the times specified in eighteen certain promissory notes of even date herewith, signed by Jacob Libby, payable to the order of P. D. Cheney.

9 One note for nine hundred and twenty dollars, due in three years after date; one note being for nine hundred and twenty dollars, due four years after date; one note for nine hundred and twenty dollars, due five years after date, and five other notes for $920 each, due in six, seven, eight, nine, & ten years after date, which eight are the principal notes, the other ten notes being for the yearly interest, viz., first note, $441.60; second note, $441.60; third note, $441.60; fourth note, $386.40; fifth note, $331.20; sixth note, $276; seventh note, $220.80; eighth note, $165.60; ninth note, $110.40; tenth note, $55.20, due, consecutively, in one, two, three, four, five, six, seven, eight, nine, and ten years after date, all payable at the office of Russell and Holmes, in Tecumseh, without interest before due and with ten per cent. per annum after maturity; and the said second party, in consideration of the premises, hereby agrees to make punctual payments of the above sums of principal and interest as each of the same, respectively, becomes due, and will also regularly and seasonably pay all the taxes and assessments against said land; Cheney is to pay taxes of 1879, and agrees to warrant and defend against all taxes of all prior years.

Libby is to pay taxes of 1880 and all subsequent years; Libby is to break two hundred acres on said tracts during the year 1880, weather permitting; Libby is to build a frame barn of 16 feet by 20 feet during the year 1880 on said tracts; Libby is to build a frame

dwelling-house of a story and a half during the year of 1880 on said tracts. In case the second party, his legal representatives or assigns, shall pay the several sums of money aforesaid punctually and at the times above limited and shall strictly perform all and singular the agreements and stipulations aforesaid after their true
10 tenor and intent, then the said first party covenants and agrees to make and execute unto the said second party, his heirs or assigns (upon request and the surrender of this contract), a deed conveying said land in fee simple, with the ordinary covenants of warranty, reserving and excepting the right of way that may be demanded for public use for railways or common roads; and it is hereby agreed and covenanted by the parties hereto that time and punctuality are material and essential ingredients in this contract; and in case the second party shall fail to pay the taxes, or if the land shall be sold for taxes, or if said second party shall fail to make the payments of money for principal or interest or to make improvements as herein agreed, upon the terms and at the times herein limited, and to perform and complete all and each of the payments, agreements, and stipulations herein mentioned, strictly and literally, without any failure or default, then this contract, so far as it may bind said first party, shall become null and void, and all the rights and interest hereby created or then existing in favor of the said second party or derived from him shall utterly cease and determine, and the right of possession and all equitable and legal interests in the premises hereby contracted shall revert to and revest in said first party without any declaration of forfeiture or any act of reentry or any other act of said first party to be performed, and without any right of said second party of reclamation or compensation for moneys paid or services performed; and in case of the forfeiture or annulling of this contract the said second party shall still be bound and liable to pay all taxes then due or assessed against said land; also all installments of principal or interest that may then be due on this contract, to be regarded and considered as rent
11 for the use of said land; also no fixtures or improvements, temporary or permanent, shall be removed from said land; and the said first party shall have the right, immediately upon the failure of the second party to comply with the stipulations herein, to enter upon the land aforesaid and take immediate possession thereof, together with all the fixtures, privileges, and appurtenances thereon or in anywise thereunto belonging or appertaining; and the said second party hereby covenants and agrees to surrender unto the said first party or his order or his assigns the said land and appurtenances without delay or hindrance, and no court shall relieve the said second party from a failure to comply strictly and literally with this contract. It is further agreed and understood that whenever one-half of the purchase price mentioned shall be paid with all accrued interest and taxes the said first party shall execute the deed as herein contracted for and take notes and a mortgage for the remaining payments, which shall run the unexpired time, as herein fixed. No modification or change of this contract can be made except by entry hereon in writing signed by both parties. An over-

sight or omission of the first party to take notice of any default of the second party shall not be deemed a waiver of their right so to do at any time.

And it is further stipulated that no assignment of the premises or of this contract shall be valid unless with the written consent of said first party and by endorsement of the assignment hereon.

Time is hereby declared by the parties hereto to be the essence of this contract, and a failure on the part of the second party to make the payments mentioned, to do and perform all the cove-
12 nants, to comply with all the agreements herein expressed and by him agreed to be performed strictly according to the terms, boundaries, and limits of time herein mentioned or either or any of them fully and completely, shall immediately work a forfeiture of all the rights and interests and claims of the said party of the second part in and to the land herein mentioned and every part thereof, together with all the crops thereon; and in case of forfeiture the said second party binds himself and representatives to give up immediate possession of all said tract of land whenever a demand is made therefor by the said party of the first part or their legal representatives.

And upon non-performance of the covenants herein mentioned, or a failure to make the payments as herein specified or any of them at the time promised, all the rights and privileges provided in this contract, giving to said second party the right to purchase the land mentioned, shall immediately terminate, and thereafter his rights hereunder shall be the rights of a tenant and he shall hold the land under this contract as a lease, and he shall be liable and subject as a tenant under the statute regulating the relations between landlord and tenant, and the first party may enforce the provisions of this contract and also recover possession of the land, with all the fixtures, privileges, crops, and appurtenances thereon, as if the same was held by forcible detainer.

In testimony whereof the said party of the first part has signed these presents in duplicate, and the second party has hereunto set his signature the day of the date hereof.

P. D. CHENEY.
JACOB LIBBY.

In presence of—

MORRIS R. LOCKE,
JAMES STUART,
As to signature of Jacob Libby.

13 STATE OF ILLINOIS, } *ss:*
Jersey County, }

On this 28th day of May, A. D. 1880, before me, Morris R. Locke, a notary public in and for said county, personally appeared Prentiss D. Cheney, well known to me to be the identical person who signed the foregoing contract, and he acknowledged the same to be his voluntary act and deed for the uses and purposes therein set forth.

Witness my hand and official seal on the date last aforesaid.
[SEAL.] MORRIS R. LOCKE,
Notary Public.

Endorsed: Bond for deed. Prentiss D. Cheney to Jacob Libby. Dated May 28, 1880, secs. 26 & 27, 5, 8. State of Nebraska, county of Gage, *ss:* Filed for record June 26th, 1880, at 11 o'clock a. m. Entered in numerical index June 26th, 1880. Recorded in Book D of Misc. Records, page 319. —— ——, county clerk and *ex officio* recorder.

Upon the back of said bill and exhibit appear endorsements in words and figures following, to wit: I hereby enter myself security for costs in the within-entitled cause Feb. 24th, 1887. Warren H. Holmes. Security for costs approved by me this 26th day of February, 1887. Elmer D. Frank, clerk. No. 365, L. Jacob Libby *vs.* Prentiss D. Cheney. Bill & exhibits. Filed Feb. 26, 1887. Elmer D. Frank, clerk. S. P. Davidson, sol. for pl'ff. A. H. Babcock, of counsel.

Thereupon, afterwards, to wit, on the 6th day of April, 1887, answer was filed in said case; which said answer is in words and figures following, to wit:

Answer of P. D. Cheney, Defendant, to the Bill of Complaint of Jacob Libby.

Circuit Court of the United States for the District of Nebraska.

14 JACOB LIBBY, Plaintiff,
vs.
PRENTISS D. CHENEY, Defendant.

This defendant, now and at all times hereafter, saving and reserving unto himself all benefit and advantage of exceptions which can or may be had or taken to the many errors, uncertainties, and other imperfections in the said complainant's bill of complaint, contained, for answer thereunto or unto so much and such parts thereof as this defendant is advised is or are necessary for him to make answer unto, *this defendant for* answering, saith—

That on and before the 28th day of May, 1880, he was the owner and was seized in fee simple of the real estate in the bill of complaint described, and further admits that on said date there was made and executed by and between this defendant and the complainant a certain contract relating to said premises, but defendant denies that said contract was a bargain and sale of said premises to the complainant, but avers the fact to be that by said contract this defendant did only demise and let to said complainant the possession and use of the lands therein described, as more fully appears by the terms of the contract itself, a copy of which is attached to the complainant's bill of complaint.

This defendant, further answering, saith that by the terms of the

contract the complainant agreed to make "punctual payments" of said sums of money, principal and interest, as each of the same became respectively due, and would also regularly and seasonably pay all taxes and assessments against said lands.

The defendant further saith that it was further agreed in said contract that if the complainant should pay the several sums of money "punctually and at the times above limited and shall
15 strictly perform all and singular the agreements and stipulations" in said contract, then the complainant will be entitled to a deed of conveyance from the defendant, and not otherwise.

Defendant further saith that it was further agreed in said contract that "time and punctuality are material and essential ingredients" in said contract.

Defendant further saith that it was further provided in said contract that if the complainant should fail to make the payments of money for principal or interest at the times in said contract limited or should fail to perform and complete each of the payments and stipulations therein contained, strictly and literally, without any failure or default, then this contract, in so far as it bound this defendant, should become null and void, and all the rights and interests in said contract created or then existing in favor of the complainant should utterly cease and determine, and the right of possession and all equitable and legal interests in the premises of the complainant should revert to and revest in this defendant without any declaration of forfeiture or any act of re-entry or any other act by the defendant to be performed, and without any right of the complainant of reclamation or compensation for moneys paid or services performed.

This defendant, further answering, saith that "time was made of the essence of said contract" by the terms and conditions thereof.

This defendant, further answering, denies that the complainant punctually paid the notes for principal and interest on the said notes in the bill of complaint described when the same became due and payable; and the defendant particularly denies that the complainant promptly paid the notes falling due may 28th, 1885,
16 but avers the fact to be that said complainant failed to pay said notes when this defendant presented said notes so maturing on said day at the banking-house of Russell & Holmes, in the town of Tecumseh, where said notes were made payable, and then and there demanded the payment of said notes in lawful money of the United States, and that payment thereof was refused, and that said notes never have been paid to this defendant.

This defendant, further answering, denies that complainant made any demand on said day at the banking-house of Russell & Holmes for said notes, and denies that the defendant wrongfully retained said notes in his possession or in violation of said contract, but avers the fact to be that the defendant was then and there present at the banking-house of Russell & Holmes and demanding payment of his money upon said notes, and that said complainant was not at said banking-house on said day either to receive said notes or to pay the same to this defendant.

This defendant, further answering, saith that he has no knowledge as to whether or no the complainant on the 19th day of August, 1885, tendered at the office of Russell & Holmes any sum of money in gold coin or left any gold coin at said office of Russell & Holmes for the use of this defendant to be applied on the purchase-money.

This defendant, further answering, saith that if any such money was so left at the banking-house of Russell & Holmes on said 19th day of August or if any such tender was made at the banking-house of Russell & Holmes on said 19th day of August that the defendant did not then and there have any knowledge of the same, and that this defendant was not then at the banking-house of Russell &

17 Holmes, but avers the fact to be that after this defendant had demanded payment of said notes maturing on the 28th of May, 1885, and payment thereof was refused, that the defendant returned to his home, at the town of Jerseyville, in the State of Illinois, and took said two notes with him to his home, at Jerseyville, Illinois, as he then and there had a good right to do, and further saith that he was not required to leave said notes at the banking-house of Russell & Holmes after the date of the maturity thereof and was not obliged to receive the money on said notes from any person or persons whomsoever after payment thereof had been demanded and refused, as above set forth.

Defendant, further answering, saith that the complainant did not tend to this defendant a mortgage on said lands to secure the remaining unpaid portion of the notes for principal and interest, and saith that the same never have been tendered to this defendant; and this defendant denies that the complainant then and there offered to fully do and perform all and singular the other agreements of the complainant in said contract provided for in order to entitle said complainant to a deed for said premises; and this defendant denies that said complainant demanded a deed from this defendant conveying to the complainant the land in the bill of complaint described; but the defendant, further answering, saith that after said notes maturing May 28th, 1885, had remained unpaid by the complainant, and after this defendant had demanded payment thereof and the same had been refused, the defendant returned to the complainant and surrendered to the complainant all of said unpaid promissory notes maturing on the 28th of May, 1885, and notified said complainant that said contract had become forfeited by reason of the failure of the complainant to pay said notes maturing on the 28th of May, 1885, and that by the terms of said contract the same became null and void.

This defendant, further answering, denies that said com-

18 plainant has had good and lawful money of the United States in the banking-house of Russell & Holmes or elsewhere to pay the moneys due this defendant on said notes, and denies that the same is now in the banking-house of Russell & Holmes for the purpose of paying said notes.

This defendant, further answering, denies that said complainant began improving said land with the full knowledge and consent of this defendant, and has broken and reduced to cultivation twelve

hundred acres of said land, and denies that said complainant has built houses and other buildings on said premises of the aggregate value of $15,000.00.

This defendant, further answering, saith that, if this court shall so direct, he is willing to return to said complainant all moneys by said complainant paid to this defendant on account of said contract, and will so pay to said complainant a reasonable compensation for all improvements made on said lands by said complainant if the court shall so direct.

This defendant, further answering, saith that under and by virtue of the terms of said contract the defendant is entitled to have and receive from the complainant a reasonable sum as rent for the use and occupation of said premises by the complainant.

Wherefore the defendant prays that the court shall order on accounting as to the amount of money paid this defendant by the complainant and as to the valuation of the permanent improvements made upon said premises by the complainant, and that an accounting shall be had for the rent due this defendant for the use and occupation of said premises by the complainant, and that this defendant is ready and willing to pay to said complainant any sum of money which the court shall decree that the complainant is
19 equitably entitled to have by virtue of the premises.

This defendant, further answering, denies that the complainant is entitled to the relief or any part thereof by said complainant demanded; and this defendant prays the same advantage of his aforesaid answer as if he had pleaded or demurred to the said bill of complaint; and this defendant prays leave to be dismissed with his reasonable costs and charges in this behalf most wrongfully sustained.

JNO. L. WEBSTER,
Solicitor for Defendant.

Upon the back of said answer appear endorsements in words and figures following, to wit: No. 365, L. U. S. circuit court, district of Nebraska, Jacob Libby, plaintiff, *vs.* Prentiss D. Cheney, defendant. In equity. Answer of Prentiss D. Cheney. Filed Apr. 6, 1887. Elmer D. Frank, clerk. Jno. L. Webster.

Thereupon, afterwards, to wit, on the 2nd day of May, 1887, replication was filed in said case; which said replication is in words and figures following, to wit:

In the Circuit Court of the United States in and for the District of Nebraska. In Equity.

JACOB LIBBY, Complainant,
vs.
PRENTISS D. CHENEY, Defendant. } No. 365, L.

The replication of Jacob Libby, plaintiff, to the answer of Prentiss D. Cheney, defendant.

This repliant, saving and reserving unto himself, now and at all times hereafter, all and all manner of benefit and advantage of exception which may be had or taken to the manifold insufficiencies of the said answer, for replication thereunto says, that *they* will aver, maintain, and prove his said bill of complaint to be true, certain, and sufficient in the law to be answered unto, and that the said answer of the said defendant is uncertain, untrue, and insufficient to be replied unto by this repliant, without this, that any other matter or thing whatsoever in the said answer contained material or effectual in the law to be replied unto, and not herein and hereby well and sufficiently replied unto, confessed and avoided, traversed or denied, is true; all of which matters and things this repliant is and will be ready to aver, maintain, and prove as this honorable court shall direct, and humbly prays as in and by his said bill of complaint he has already prayed.

SAMUEL P. DAVIDSON,
Solicitor for Plaintiff.

Upon the back of said replication appear endorsements in words and figures following, to wit: No. 365, doc. L. U. S. circuit court, district of Nebraska. In equity. Jacob Libby *vs.* Prentiss D. Cheney. Replication. Filed May 2, 1887. Elmer D. Frank, clerk. Samuel P. Davidson, solicitor for plaintiff.

Thereupon, afterwards, to wit, on the 3rd day of August, 1887, depositions on behalf of plaintiff were filed in said case; which said depositions are in words and figures following, to wit:

Notice.

In the Circuit Court of the United States for the District of Nebraska.

JACOB LIBBY, Plaintiff, *vs.* PRENTISS D. CHENEY, Defendant.

Depositions *de bene esse.*

Please take notice that the depositions *de bene esse* of Jacob Libby, C. A. Holmes, Warren H. Holmes, Albert N. Wisewell and others, and S. P. Davidson will be taken, to be read in evidence at the trial of said cause on the part of the plaintiff therein, before competent

authority, at the office of J. S. Harris, notary public, in Te-
21 cumseh, in the county of Johnson and State of Nebraska, commencing on the 13th of July, 1887, at the hour of 2 o'clock in the afternoon of said day, with authority to adjourn from day to day till all such depositions shall have been completed, at which time and place you are hereby notified to be present and put interrogatories to the said witnesses if you shall think fit.

The reason for taking the depositions is that said witnesses live at a greater distance than one hundred miles from Omaha, Nebraska, the place of trial of this action, and the testimony is required to be reduced to writing in said cause.

Dated at Tecumseh, this 29th day of June, 1887.

SAMUEL P. DAVIDSON,
Sol'r for Plaintiff.

To Hon. J. L. Webster, sol. for def't.

Service of the above notice by receiving a copy thereof on this 30th day of June, 1887, is admitted, and I consent that said depositions may be taken as above and before a notary public.

JNO. L. WEBSTER,
Sol'r for Def't.

STATE OF NEBRASKA, }
County of Johnson, } ss:

In the Circuit Court of the United States for the District of Nebraska.

Be it remembered that on this 13th day of July, A. D. 1887, I, J. S. Harris, a notary public duly appointed, commissioned, and qualified, and residing in Johnson county, Nebraska, and by the laws of the State of Nebraska authorized and empowered to take depositions in causes pending in the circuit court of the United States,
22 did call and cause to be — personally appear before me, at my office, in Tecumseh, Johnson county, Nebraska, and in said district, Jacob Libby, Chas. A. Holmes, Warren H. Holmes, and S. P. Davidson to testify and the truth to say on the part of the plaintiff in a suit or matter of controversy now pending and undetermined in the circuit court of the United States for the district of Nebraska, at Omaha, in the district aforesaid, wherein Jacob Libby is plaintiff and Prentiss D. Cheney is defendant.

Int. 1. State your name, age, residence, and occupation.

Ans. 1. Jacob Libby; age, sixty-three years; residence, Platte county, Nebraska; occupation, farmer.

Int. 2. Are you the plaintiff in this cause and are you acquainted with the defendant?

Ans. 2. I am the plaintiff and am acquainted with Mr. Cheney by correspondence. I never had any conversation with him.

Int. 3. State whether or not you and the defendant made, entered into, and executed the contract mentioned in the bill herein.

Obj. 1.—Objected to as immaterial by defendant.

Ans. Yes, I did—or we did.

Int. 4. State whether or not, immediately after the execution of said contract and in pursuance of the same, and with Mr. Cheney's consent, you entered into possession of the land therein described.

Obj. 2.—Objected to as immaterial by defendant.

Ans. 4. I did.

Int. 5. State whether or not you and those claiming under you have continued in possession of said land ever since and still remain in possession thereof.

Ans. 5. We have.

23 Int. 6. State whether or not, during the season of 1880, you did the breaking, erected the buildings, and made all the improvements as required by the terms of said contract.

Obj. 3.—Objected to as immaterial by defendant.

Ans. 6. I did.

Int. 7. State whether or not you made the payments mentioned in said contract, both of principal and interest, promptly as they became due, up to and including the payments due May 28th, 1886.

Ans. 7. I have.

Obj. 4.—Objected to as incompetent by defendant.

Int. 8. State whether or not you have made the payments which became due May 28th, 1887, both of principal and interest.

Obj. 5.—Objected to as immaterial by defendant.

Ans. 8. I have.

Int. 9. State in what manner you universally made these payments as they became due.

Obj. 6.—Objected to as incompetent and immaterial by defendant.

Ans. 9. I made them by sending bank drafts to Russell & Holmes' bank, at Tecumseh, Nebraska, except the first payment that I made to Pinero, at Tecumseh, Nebraska, in bank drafts. Pinero was acting as agent for Mr. Cheney. He delivered the contract to me for Mr. Cheney and I delivered the drafts to him for Mr. Cheney.

Int. 10. (Handing witness cancelled note and letter.) Please look at this note and this letter attached to it and state whether or not this is the note mentioned in said contract due two years after date and whether the letter attached to it is the letter from Mr. Cheney, the defendant, transmitting the same to you after the same had been paid in the manner you have above described.

24 Obj.—Objected to as immaterial by defendant.

Ans. 10. This is the note and this is the letter I received from Mr. Cheney. This is the letter transmitting the note after it had been paid.

Int. 11. State whether or not this letter is in the handwriting of the defendant, Mr. Cheney.

Obj. 8.—Objected to as incompetent by defendant.

Ans. 11. It is.

(1.) Plaintiff offers in evidence said note and letter, which are attached hereto, marked Exhibits "A" and " B."

EXHIBIT A.

$441.60. TECUMSEH, NEBRASKA, *May 28th*, 1880.

Two years after date, for value received, I promise to pay to the order of P. D. Cheney four hundred and forty-one and $\frac{60}{100}$ dollars, payable at the office of Russell & Holmes, without interest before due, with ten per cent. per annum after maturity.

JACOB LIBBY.

Second year's interest note.

Endorsed: Without recourse on me in any event. Paid May 19, '82. P. D. Cheney. Exhibit "A." Filed July 13th, 1887. J. S. Harris, notary public.

EXHIBIT " B." P. D. Cheney.

JERSEYVILLE, ILLINOIS, *May 20th*, 1882.

J. Libby, Esq., Madison, Madison county, Neb.

DEAR SIR: Yours of the 10th rec'd with a banking check for $441.60 to pay your int. note, due May 28, '82, No. 3138, which I have cancelled and herein send it to you. I am glad to hear you are prospering on the land. I would prefer to make the deed according to the terms of the bond.

25 Yours truly, P. D. CHENEY.

[Endorsed:] Exhibit " B." Filed July 13th, 1887. J. S. Harris, notary public. (Exhibit C. A. P.)

Obj. 9.—Objected to as incompetent and immaterial by defendant.

Int. 12. State how it come that Mr. Cheney sent his note direct to you and not to the bank of Russell & Holmes, if you know.

Obj. 10.—Objected to as incompetent and immaterial by defendant.

Ans. 12. I sent the draft to Russell & Holmes and they wrote me that the note was not there and that they had sent the draft direct to Mr. Cheney, and he sent me the cancelled note.

Int. 13. State whether or not all of the notes mentioned in said contract paid, as you have above described, up to and including those due four years after their date were cancelled and surrendered to you.

Obj. 11.—Objected to as incompetent, immaterial, and misleading by defendant.

Ans. 13. They were cancelled and surrendered to me.

Int. 14. (Handing witness letter.) State in whose handwriting this letter is and what notes are referred to therein.

Obj. 12.—Objected to as incompetent by defendant.

Ans. 14. This is Mr. Cheney's handwriting and is the principal and the other is the interest note, due May 28th, 1884, mentioned in the contract.

Plaintiff offers Exhibit "C."—Plaintiff offers in evidence said letter, which is hereto attached, marked Exhibit "C."

EXHIBIT "C."

Whitney House, W. C. Whitney, proprietor.

CAWKER CITY, KANS., *June* 4, 1884.

J. Libby, Esq.

26 DEAR SIR: It is now somewhat uncertain whether I will be able to visit Norfolk and your place on this trip.

I find it slow work in getting from place to place and I am much behind time.

I sent the notes to Russell & Holmes, as requested. I have not yet bought any cattle, and I am not as enthusiastic about it as when I left home.

Yours truly, P. D. CHENEY.

[Endorsed:] Exhibit "C." Filed July 13th, 1887. J. S. Harris, notary public.

Obj. 13.—Objected to as immaterial by defendant.

Int. 15. State whether or not on the 4th day of March, 1885, you wrote to Mr. Cheney, the defendant, in reference to this contract. If no, state the substance of said letter.

Obj. 14.—Objected to as leading and immaterial and not the best evidence by defendant.

Ans. 15. I wrote to him on the 4th of March that I would pay him all the principal notes mentioned in said contract and the interest note due May 28, 1885, if he would make me a deed.

(1). Plaintiff's demand.—The plaintiff here demands of the defendant that he produce said letter of March 4th, 1885, that the same may be introduced in evidence, or that a copy thereof may be made for that purpose, or that the same may be produced within four days from this date.

(3.) Plaintiff offers Exhibit "D."—The plaintiff here offers in evidence notice and acceptance of service hereof, attached here, marked Exhibit "D."

In the Circuit Court of the United States for the District of Nebraska.

JACOB LIBBY, Plaintiff, *vs.* PRENTISS D. CHENEY, Defendant.

27 The above-named defendant is hereby notified that he is requested and required to produce the letters written to him by and signed by said plaintiff, dated March 4th, 1885, May 20th, 1885, June 12th, 1885, and June 25th, 1885, respectively; also the letter written and signed by S. P. Davidson, attorney for plaintiff, dated February 4th, 1887, to said defendant, and all pertaining to the matter in controversy in this suit. You are required to produce the above-mentioned letters, that they may be introduced in evidence or that copies may be made of them for that purpose on the trial hereof.

SAMUEL P. DAVIDSON,
Sol. for Plaintiff.

I acknowledge service of above notice this 12th day of July, 1887.
JNO. L. WEBSTER,
Attorney for Defendant.

Service accepted subject to approval of Mr. Webster by J. H. McIntosh.

Obj. 15.—Objected to as incompetent by defendant.

Int. 16. (Handing witness letter.) State in whose handwriting this letter is and whether it is in reply to your said letter of March 4th, 1885.

Obj. 16.—Objected to as leading and incompetent by defendant.

Ans. 16. It is in Mr. Cheney's handwriting, the defendant, and in reply to my letter of March 4th, 1885.

(4.) Plaintiff offers Exhibit "E."—Plaintiff offers in evidence said letter, which is attached hereto and marked Exhibit "E."

GRAND CENTRAL HOTEL,
NEW YORK, *March 19th*, 1885.

DEAR SIR: Your letter of 4th has just reached me. I have no papers with me and cannot now attend to the matter as you request.
28 I expect to go to New Orleans to the Exposition and to be at home in time to see to it properly. If I am behind time no harm will come to you.

Yours truly, P. D. CHENEY.

[Endorsed:] Exhibit "E." Filed July 13th, 1887. J. S. Harris, notary public.

Obj. 17.—Objected to as immaterial by defendant.

Int. 17. State whether or not, on the 20th May, 1885, you wrote to the defendant in reference to this contract; and, if so, state the

substance of that letter and whether you have in your possession the original.

Obj. 18.—Objected to, as incompetent and immaterial and not the best evidence, by defendant.

Ans. 17. I did write to him on the 20th of May, 1885, that I would like to pay all the principal notes in said contract and the interest note due May 28th, 1885, if he would make me a deed. I have not the original letter.

Int. 18. State in whose handwriting this letter is (handing witness letter) and if the same was received in reply to your letter of May 20th, 1885.

Obj. 19.—Objected — as incompetent and immaterial by defendant.

Ans. 18. It is Mr. Cheney's handwriting. It was received in reply to my letter of May 20th, 1885.

(5.) Plaintiff offers Exhibit "F."—Plaintiff offers in evidence said letter, which is attached hereto, marked Exhibit "F."

P. D. Cheney.

JERSEYVILLE, ILLINOIS, *May 23d*, 1885.

J. Libby, Esq., Madison, Neb.

DEAR SIR: Yours of 20th is received. I think it probable that I can do as you suggest, but I will be in Beatrice between the 1st and 10th of June on other business, and will then make enquiries and see if I can lend the money to good hands, and will then let you know more certainly.

29 Yours truly, P. D. CHENEY.

[Endorsed:] Exhibit "F." Filed July 13th, 1887. S. J. Harris, notary public.

Obj. 20.—Objected to as incompetent and immaterial by defendant.

(2.) Plaintiff's demand.—Plaintiff here demands of defendant that he produce said letter of May 20th, 1885, either now or within four days from this date, that the same may be introduced in evidence or that a copy thereof may be made for that purpose.

Int. 19. State whether or not, on the 26th day of May, 1885, you sent a draft to Russell and Holmes, at Tecumseh, in payment of the two notes mentioned in said contract, due May 28th, 1885.

Obj. 21.—Objected to, as leading and no evidence of payment, by defendant.

Ans. 19. I did send such a draft.

Int. 20. (Handing witness paper.) State what that paper is; state to whom you sent it, when you sent it, and for what purpose you sent it.

Ans. 20. It's a bank draft to Russell & Holmes. I mean I sent it to Russell & Holmes. I sent it the 26th of May, 1885. I sent it to pay the two notes due May 28th, 1885, mentioned in said contract.

Obj. 22.—Objected to, the above question and answer, as no evidence of payment by defendant.

(6.) Plaintiff offers in evidence Exhibit "G."—Plaintiff offers in evidence said paper or bank draft, with all the endorsements thereon, which is attached hereto and marked Exhibit "G."

James Stuart, banker.

$1,251.20. MADISON, NEB., *May* 26, 1885.

To First National Bank, Omaha, Neb.:

Pay to the order of Russell & Holmes twelve hundred fifty-one and $\frac{20}{100}$ dollars, $1,251.20.

No. 6613. JOHN S. CANE, *Cashier.*

[First National Bank, Omaha, June 1, 1885. Paid. Second receiver.]

30 Endorsed: Pay F. H. Davis, cashier, or order, for collection, account of Russell & Holmes, bankers, Tecumseh, Neb. Russell & Holmes. Exhibit "G." Filed July 13, 1887. J. S. Harris, notary public.

Obj. 23.—Objected to, as no evidence of payment, by defendant.

Int. 21. State whether or not Mr. Cheney, the defendant, ever notified you, in accordance with his letter above introduced in evidence, dated May 23rd, 1885, whether he would comply with the request mentioned in your letter of May 20th, 1885.

Obj. 24.—Objected to as immaterial by defendant.

Ans. 21. I never received any such notice.

Int. 22. State whether he ever corresponded or conversed with you about the matter contained in his letter of May 23rd, 1885, and your letter of May 20th, 1885, after the date of those letters.

Obj. 25.—Objected — as immaterial by defendant.

Ans. 22. He never did.

Int. 23. State whether, on or about the 12th June, 1885, you wrote to the defendant; and, if so, state whether you have that letter or a copy of it, and, if not, please state the contents of the same fully.

Obj. 26.—Objected — as incompetent and immaterial by defendant.

Ans. 23. I did write to him; I have not the original; I have not a copy with me. The substance of it was the gold was deposited at Russell & Holmes' office to pay the two notes due May 28th, 1885, mentioned in the contract.

Int. 24. State whether or not you know Mr. Cheney received said letter, and state when, if at all, you have seen said letter and the circumstances under which you saw it, and whether you heard Mr.

Cheney in his testimony admit that he received it in due course of mail.

Obj. 27.—Objected to as incompetent and immaterial by defendant.

31 Ans. 24. I know he did receive said letter. I saw it at Lincoln, in the United States court, in January, 1887, in the trial of the ejectment suit of Cheney against Libby. It was introduced in evidence by Mr. Cheney, the plaintiff in that case and the defendant in this. He did admit in his testimony that he received it in due course of mail.

(3.) Plaintiff's demand.—Plaintiff here demands of the defendant that he produce said letter, either now or within four days from this date, that the same may be introduced in evidence, or that a copy thereof may be made for that purpose.

Int. 25. State when, if ever, the defendant returned to you the uncancelled notes mentioned in said contract; give the date of his letter transmitting the same to you, if you can.

Ans. 25. I received them out of the post office the 25th June, 1885. The date of his letter was the 20th June, 1885, in which said notes were transmitted.

Int. 26. State what you did with said notes, and how soon after you received them did you do it?

Obj. 28.—Objected to as immaterial by defendant.

Ans. 26. I received them on the 25th June, 1885, and mailed them to Russell & Holmes, at Tecumseh, Nebraska, on the same day, and notified Mr. Cheney I had done so on the 25th June, 1885; that the said notes were sent to Russell & Holmes, subject to his order and for his use and benefit.

Int. 27. State whether or not you have the original letter you sent to Mr. Cheney, and, if you have not, if you have a copy of it.

Obj. 29.—Objected to as immaterial by defendant.

Ans. 27. I have not the original letter. I have a copy of it.

Int. 28. Produce said copy, if you will, and have it attached
32 to your deposition as a part thereof.

Obj. 30.—Objected to as immaterial by defendant.

Ans. 28. I hand the said notary the copy and ask that it be attached to my deposition as a part thereof.

Said copy is hereby attached hereto and marked Exhibit "H." Plaintiff offers in evidence said copy.

(7.) PLAINTIFF'S EXHIBIT "H."

(Copy.)

Office of James Stuart, banker.

MADISON, NEB., *June* 25, 1885.

P. D. Cheney, Esq.

SIR: Your letter of the 20th inst., inclosing my 10 unpaid notes and two which were paid and which you had protested wrongfully, is received. I refuse to accept said notes, excepting the two which were paid, and have this day sent them to your bankers, Messrs. Russell & Holmes, of Tecumseh, Nebr., for your use and benefit and subject to your order. I shall make payments as fast as they become due and shall require you to execute a conveyance of the land, in accordance with the terms of the contract. It will be useless for you to send me any of these notes, except you send them for payment.

Yours, &c., JACOB LIBBY.

[Endorsed:] Copy. Exhibit "H." Filed July 13, 1887. J. S. Harris, notary public.

(4.) Plaintiff's demand.—Plaintiff here demands of the defendant that he produce said original letter either now or within four days from this date, that the same may be introduced in evidence or that a copy thereof may be made for that purpose.

Int. 29. (Handing witness letter.) State in whose handwriting this letter is and whether the same was received in reply to yours of June 25th, 1885, above mentioned.

Obj. 31.—Objected to — immaterial by defendant.

Ans. 29. It is in the handwriting of Mr. Cheney, the defendant. This letter was received in reply to mine of June 25th, 1885.

33 Plaintiff offers in evidence the letter, which is attached hereto, marked Exhibit "I."

(8.) PLAINTIFF'S EXHIBIT "I."

Registered. P. D. Cheney.

JERSEYVILLE, ILLINOIS, *July 9th*, 1885.

Jacob Libby, Esq., Madison, Nebraska.

DEAR SIR: Yesterday I received your registered letter of June 25th, informing me that you had sent your unpaid notes to Russell and Holmes subject to my order, &c. I now write this note to say that I do not recognize the notes as being subject to my order.

Yours truly, P. D. CHENEY.

[Endorsed:] Exhibit "I." Filed July 13th, 1887. J. S. Harris notary public.

Obj. 32.—Objected to as immaterial by defendant.

Int. 30. State where said notes have remained ever since you sent them to Russell and Holmes above mentioned.

Ans. 30. The notes have remained with Russell & Holmes, bankers, Tecumseh, Nebraska, ever since the 26th June, 1885.

Int. 31. State whether you have had them in your possession or under your control at any time since that date.

Ans. 31. I have not had them in my possession or under my control at any time since that date.

Int. 32. State whether or not at the commencement of this suit you had punctually and fully performed all other obligations mentioned in said contract, required to be performed by you as therein mentioned, to entitle you to a deed.

Obj. 33.—Objected to, as incompetent and requiring an answer involving conclusions of law and conclusions of facts and not facts, by defendant.

34 Ans. 32. I had performed punctually all said obligations.

Obj. 34.—Objected to on same ground as question by defendant.

Int. 33. State whether or not the money you sent to Russel & Holmes & pay all of the notes due May 28th, 1885, May 28th, 1886, and May 28th, 1887, mentioned in said contract, has ever been drawn out by you, and whether the same has not remained ever since and still does remain on deposit at said bank of Russell and Holmes for and subject to the order of this defendant.

Obj. 35.—Objected to as immaterial, incompetent, leading, and containing conclusions of facts. Witness has not testified that he has ever sent Russell & Holmes, bankers, at Tecumseh, Nebraska, money to pay any of said notes by defendant.

Ans. 33. The money has never been drawn out by me. It does remain on deposit for the use and order of this defendant, and has so remained ever since deposited, as I have above stated.

Int. 34. When this contract and the notes in connection therewith were made who furnished the blanks and at whose instance the office of Russell and Holmes — made the place of payment of said notes?

Obj. 36.—Objected to as immaterial by defendant.

Ans. 34. The blanks were furnished by Mr. Pinero, the agent of Mr. Cheney, and at Cheney's instance the bank of Russell and Holmes was made the place of payment of said notes.

Int. 35. Were all the notes prepared on a blank similar to the note above introduced in evidence, marked Exhibit "A," except as to the time of maturity?

Obj. 37.—Objected to as immaterial and leading by defendant.

Ans. 35. They were prepared on similar blanks, except as to time of maturity.

Int. 36. Have you the notes in your possession, the notes
35 due three years after date?

Obj. 38.—Objected to as immaterial by defendant.

Ans. 36. I have.

Int. 37. State whether or not they were paid and canceled on the dates of the stamp on the face of the notes.

Obj. 39.—Objected to as immaterial, hearsay, and leading by defendant.

Ans. 37. They were.

Int. 38. (Handing the witness two notes.) Are these the notes to which you refer?

Obj. 40.—Objected to as immaterial by defendant.

Ans. 38. Yes; they are.

(9.) Plaintiff offers Exhibits "J & K."—Plaintiff offers in evidence said notes, which are hereto attached, which are marked Exhibits "J & K."

$441.60. TECUMSEH, NEBRASKA, *May 28th*, 1880.

Three years after date, for value received, I promise to pay to the order of P. D. Cheney four hundred and forty-one & $\frac{60}{100}$ dollars, payable at the office of Russell and Holmes, without interest before due, with ten per cent. per annum after maturity.

JACOB LIBBY.

(Third year's interest note.)
(Russell & Holmes, bankers, Tecumseh, Neb. Paid May 29, 1883.)
(Russell & Holmes, Tecumseh, Neb. No. 17575.)

Endorsed: 3137. Without recourse on me in any event. Exhibit "J." Filed July 13th, 1887. J. S. Harris, notary public.

EXHIBIT K.

$920. TECUMSEH, NEBRASKA, *May 28th*, 1880.

Three years after date, for value received, I promise to pay to the order of P. D. Cheney nine hundred and twenty dollars, pay-
36 able at the office of Russell and Holmes, without interest before due, with ten per cent. per annum after maturity.

JACOB LIBBY.

Third year's principal note.
(Russell & Holmes, bankers, Tecumseh, Neb. Paid May 29, 1883.)
(Russell & Holmes, Tecumseh, Neb. No. 17574.)

Endorsed: 3129. Without recourse on me in any event. Exhibit "K." Filed July 13th, 1887. J. S. Harris, notary public.

Obj. 41.—Objected to as immaterial by defendant.

Int. 39. Have you the notes in your possession, due four years after date, mentioned in said contract; and, if so, will you produce them?

Obj. 42.—Objected to as immaterial by defendant.

Ans. 39. I have, and I here produce them.

Int. 40. State whether or not these two notes were paid and canceled and surrendered to you on the date of Russell & Holmes' stamp on face of the same.

Obj. 43.—Objected to as immaterial by defendant.

Ans. 40. They were paid and canceled on that date and sent to me by mail.

(10.) Plaintiff offers Exhibits "L & M."—Plaintiff offers in evidence here two notes, with the endorsements thereon, which are hereto attached and marked Exhibits "L" & "M."

$386.40. TECUMSEH, NEBRASKA, *May 28th*, 1880.

Four years after date, for value received, I promise to pay to the order of P. D. Cheney three hundred and eighty-six $\frac{40}{100}$ dollars, payable at the office of Russell & Holmes, without interest before due, with ten per cent. per annum after maturity.

JACOB LIBBY.

Fourth year's interest note.
(Russell & Holmes, bankers, Tecumseh, Neb. Paid May 31, 1884.)
(Russell & Holmes, Tecumseh, Neb. No. 17214.)

Endorsed: 3136. Without recourse on me in any event.
37 P. D. Cheney. Exhibit "M." Filed July 13, 1887. J. S. Harris, notary public.

$920. TECUMSEH, NEBRASKA, *May 28th*, 1880.

Four years after date, for value received, I promise to pay to the order of P. D. Cheney nine hundred and twenty dollars, payable at the office of Russell & Holmes, without interest before due, with ten per cent. per annum after maturity.

JACOB LIBBY.

Fourth year's principal note.
(Russell & Holmes, bankers, Tecumseh, Neb. May 31, 1884.)
(Russell & Holmes, Tecumseh, Neb. No. 19213.)

Endorsed: 3128. Without recourse on me in any event. Exhibit "M." Filed July 13th, 1887. J. S. Harris, notary public.

Obj. 44.—Objected to as immaterial by defendant.

Int. 41. State in what manner all these notes were paid?

Obj. 45.—Objected to as immaterial by defendant.

Ans. 41. They were paid in bank drafts sent to Russell & Holmes, at Tecumseh, Nebraska.

Int. 42. State whether or not Mr. Cheney ever at any time ob-

jected to your manner of paying by your sending drafts to Russell and Holmes until June 1st, 1885.

Obj. 46.—Objected to, immaterial, by defendant.

Ans. 42. He never did object to the manner of payment.

Int. 43. You will now state what improvements you have placed upon the lands in controversy or what improvements have been placed thereon with your consent, and state the value as near as you can of all of said improvements and whether they have all been made under and in pursuance with this contract.

Obj. 47.—Objected to, incompetent.

Ans. 43. We have broken up and improved and cultivated about twelve hundred acres; built five houses and stable and out-buildings — each house; made wells to each house; erected two windmills; fenced one whole section with wire and posts and fenced half of the other section with hedge. We have set out some fruit
38 trees and shrubbery, all to the value of about ten thousand dollars; all was done under and in pursuance of this contract.

Int. 44. State whether all of those improvements are of a permanent and substantial nature.

Ans. 44. They are.

Int. 45. State what the condition of all of the land in controversy was at the time you took possession of it under this contract.

Ans. 45. Raw prairie or unimproved wild land.

Cross-examination by J. H. McIntosh, representing counsel for defendant:

Int. 1. You say you are not personally acquainted with Mr. Cheney?

Ans. 1. I am not.

Int. 2. How often have you seen him that you know of?

Ans. 2. Only once, at the time of court in Lincoln, as referred to in direct examination.

Int. 3. Have you ever seen him write?

Ans. 3. No.

Int. 4. Do you know, of your own positive knowledge, that he can write?

Ans. 4. No.

Int. 5. Then, when you testify at the various times in this deposition that letters attached hereto as exhibits are in Mr. Cheney's handwriting, you don't know whether they are in Mr. Cheney's handwriting or not, do you?

Ans. 5. I do not; only as the letters I have received from him at different times.

Int. 6. You don't know that they were in his handwriting?

Ans. 6. I do not; only that I have received letters with his name attached to them.

Int. 7. When the notes payable on the 28th of May, 1885, come

due, you say you sent a draft to the banking-house of
39 Russell & Holmes, at Tecumseh, Nebraska, for the purpose of paying said notes; whose name was that draft deposited in?

Ans. 7. I don't know.

Int. 8. Don't you know it was not deposited in Cheney's name?

Ans. 8. I don't know. I was not here, and could not tell.

Int. 9. You do know that you did not direct it to be deposited in Cheney's name?

Ans. 9. I directed it to pay the notes, as they were made payable there.

Int. 10. But you did not direct it to be deposited in Cheney's name?

Ans. 10. My expectation was that it was to be deposited in Cheney's name to pay the two notes due May 28th, 1885.

Obj. 1.—Answer objected to by defendant on the ground that it is an evasive — and does not state facts. Witness refuses to give a direct answer to defendant's question.

Int. 11. Whom was the draft payable to?

Ans. 11. Russell & Holmes, Tecumseh, Neb.

Int. 12. If you expected it to be deposited in Cheney's name why did you make it payable to Russell & Holmes?

Ans. 12. Because the notes were due at Russell & Holmes' office, Tecumseh, Nebraska.

Int. 13. You knew, didn't you, that a draft payable to Russell & Holmes could not be collected by Cheney unless endorsed by Russell & Holmes, didn't you?

Ans. 13. It has always been my custom in this business to make the drafts payable to Russell & Holmes to pay all former notes as they become due to Mr. Cheney.

Obj. 2.—Answer objected to as evasive by defendant. Witness objects to answer directly.

Int. 14. After the sending of the draft referred to — Russell & Holmes on the 26th of May, 1885, you gave the matter of the
40 payment of the notes falling due the 20th of May, 1885, no further attention until your letter of June 12th, 1885, referred to in direct examination?

Ans. 14. I received a letter from Russell and Holmes saying Mr. Cheney wanted the payment in gold or United States currency. I received this letter about June 5th or 6th. On the 8th June I sent a man here—his name was James Stewart—to pay Mr. Cheney in gold or United States currency if Mr. Cheney could be found. I wrote or telegraphed to Russell and Holmes as soon as I heard that kind of a payment was not satisfactory to make him such payment as would be—to pay him in gold.

Int. 15. Did you have the gold at Russell & Holmes' at the time you wrote or telegraphed them?

Ans. 15. The gold was there.

Int. 16. That is, they had gold in the bank?

Ans. 16. There was gold in the bank to pay the notes.

Int. 17. How do you know there was?

Ans. 17. They so informed me.

Int. 18. Then all you know about there being gold in the bank to pay your notes is that some one told you that there was gold in the bank—mere hearsay?

Ans. 18. They so informed me.

Int. 19. You sent your banker down here on the 8th of June, you say; what instruction had he from you?

Ans. 19. To pay the notes and in the funds Mr. Cheney demanded.

Int. 20. Did you send them the gold or greenbacks with him?

Ans. 20. I gave him an order to get it from Russell & Holmes.

Int. 21. Did he get it from Russell & Holmes?

Ans. 21. He could not find Mr. Cheney to pay it. He did not get it for that reason.

Int. 22. When your agent sent here on the 8th could not find Mr. Cheney what did he do—I mean the 8th of June?

41 Ans. 22. I think it was the 9th of June that he reached here. He made an effort to find Mr. Cheney, and went to Beatrice to find him, as I understood by one of his letters that he was to be there between the 1st and 10th of June, 1885. When he came back home that is all he did.

Int. 23. How do you know your agent, Stewart, did any of the things testified to?

Ans. 23. He so informed me.

Int. 24. Then, on June 12th, you wrote the letter referred to in your direct examination, having taken from May 26th — June 12th in this matter, having taken no further steps than those you have already testified to in this cross-examination?

Ans. 24. That is all I did personally; the bankers made an effort to pay him in gold.

Int. 25. How do you know they did?

Ans. 25. They so informed Mr. Stewart and he so informed me.

Int. 26. Then, when you wrote your letter of June 12th saying you had the gold to pay him, you had not actually deposited the gold or United States currency anywhere yourself, and did not have the gold or United States currency, as you said in your letter?

Ans. 26. The gold was at Russell & Holmes' to pay these notes, as I was informed by them—notes due May 28th, 1885—the notes in controversy.

Int. 27. That was the same gold that was there on and after the receipt by them of the draft sent them by you May 26th, 1885?

Ans. 27. It was the same gold or United States currency, the funds he demanded after 4:30 p. m. June 1st, 1885.

Int. 28. What notes was it he, defendant, sent you in his letter dated June 20th, 1885?

Ans. 28. The notes due May 28th, 1885, and all notes to

42 become due subsequently.

Int. 29. What of these notes forwarded to you by the defendant did you send to the bank to be subject to the defendant's order and for his use and benefit?

Ans. 29. The same notes he sent to me, including the notes due May 28th, 1885.

Int. 30. You say that all payments previous to 1885 were paid in bank drafts. How do you know they were?

Ans. 30. Well, I paid them in bank drafts.

Int. 31. To Cheney?

Ans. 31. I paid sixteen hundred dollars to Cheney's agent, Pinero. The rest I sent to Russell & Holmes; one of them was sent by Russell & Holmes to Cheney. I sent it to Russel & Holmes by drafts, the same as in 1885.

Int. 32. Then you don't know whether Cheney received payments previous to 1885 in drafts or in what form he received payments?

Ans. 32. No.

Int. 33. When did this farm in controversy pass out of your possession?

Ans. 33. It has not passed out of my possession and those claiming under me.

Int. 34. Do you occupy it now; do you live there now?

Ans. 34. Those claiming under me live there; I do not live there, but those claiming under me live there.

Int. 35. Did you ever live there?

Ans. 35. No, sir.

Int. 36. When were you last at the farm?

Ans. 36. I was there last January.

Int. 37. How long were you there?

Ans. 37. Two or three hours.

Int. 38. What were you doing there?

Ans. 38. Nothing in particular; I was out looking over the
43 place.

Int. 39. How often have you been in the habit of going there?

Ans. 39. I have not been there but little during the last three years. I don't know that I have been there but this once during the last three years. Previous to the last three years I was there once every six or eight weeks during the summer season, but during the winter season, it might have been six or eight months, I was not there.

Int. 40. Did you personally superintend the improvements that you say have been made there?

Ans. 40. I was there when one of the houses and barns was built and I hired men to build two other houses. I hired men and used my own teams to break about four hundred acres and I had men to fence one section. I had my son there to superintend it. This fencing was done in 1881 or 1882.

Int. 41. Now, what part of these improvements were made before January 1st, 1885?

Ans. 41. Nearly all of them; I would say nine-tenths, and probably more.

Int. 42. How do you know that twelve hundred acres has been improved and broken?

Ans. 42. I was out there and looked over it; I was not over all of it; I was on sections 26 & 27 and could see all over it.

Int. 43. What improvements have been made in the last two years, if any?

Ans. 43. I couldn't tell.

Int. 44. Do you know what improvements were made previous to two years ago?

Ans. 44. Nine-tenths of the improvements were made previous to that time.

Int. 45. Now you know what improvements are there now and what improvements were there two years ago, how is it that
44 you do not know what improvements were made within the last two years?

Ans. 45. Because I have not been there but once for the last two years.

Int. 46. Then the improvements you testified to are those that were there two years ago?

Ans. 46. They were there last January, 1887.

Int. 47. Did you go over the farm last January to investigate the farm and to see what improvements were there?

Ans. 47. I took a general view of them; I did not measure them; I went there to see what the improvements were.

Int. 48. Do you own other land in that neighborhood?

Ans. 48. I do not now and have not lately.

Int. 49. Now, you have only been in that neighborhood but once in three years. How do you pretend to say what the value of improvements on a farm there now is?

Ans. 49. I have built houses in different places and have broken land and know what improvements cost, but I don't know what improvements would sell for now.

Int. 50. Isn't it a fact during the last three years—during your absence from the neighborhood where this land is situated—that you have practically lost run of values in that neighborhood?

Ans. 50. Somewhat so, but not wholly, as I have tried to keep somewhat posted.

Int. 51. Your information on that subject is not different from that of any other well-informed man living at a distance of a hundred miles or so?

Ans. 51. Not anybody who has done the amount of building and in the habit of making the improvements I have. I have improved some twelve small farms at different times.

Int. 52. Do you know that the improvements you specify
45 are on the farm at the present time?

Ans. 52. I do not. I knew that they were last January.

Redirect examination by S. P. DAVIDSON, counsel for plaintiff:

Int. 53. State whether or not you have not heard Mr. Cheney admit that the letter you have identified as having been written by him *were* in his handwriting.

Ans. 53. I did hear him so admit.

JACOB LIBBY.

Subscribed to in my presence and sworn to before me this 13th day of July, A. D. 1887.

[SEAL.] J. S. HARRIS,
Notary Public.

And also the said S. P. DAVIDSON, being about the age of thirty-nine years and having been by me first cautioned and sworn to testify the truth, the whole truth, and nothing but the truth in the matter of controversy aforesaid, I did carefully examine the said S. P. DAVIDSON, and he did thereupon depose, testify, and say as follows, viz:

My name is S. P. Davidson. My age is thirty-nine years. My residence is Tecumseh, Nebraska. I am solicitor for the plaintiff in this cause. On the 4th day of February, 1887, as attorney for the plaintiff, Mr. Libby, I wrote to the defendant, Mr. Cheney, in reference to the matter now in controversy. I have not the original letter in my possession, nor is it under my control, but I have in my hand a copy of the same and now hand it to the notary and ask that it be made a part of my testimony and attached as an exhibit.

Said copy is attached hereto and marked Exhibit "N."

PLAINTIFF'S EXHIBIT "N."

Davidson & Giffen, attorneys and counselors at law.

TECUMSEH, NEB., *Feb. 4th*, 1887.

P. D. Cheney, Esq.

46 DEAR SIR: Mr. Jacob Libby has instructed me to say to you that if you will make him the deed called for in his contract with you for sections 26 and 27, in township 5, range 8 east, in Gage county, Nebraska, on the 28th day of next May, he will pay you in cash all the unpaid portion of the principal named in said contract and all interest due at that date, if you prefer this to strictly following the contract. If, however, you prefer that the unpaid principal shall run the full time, as agreed upon in the contract, as he has already paid into the bank of Russell and Holmes for your benefit the amounts in full for all installments past due, which aggregate more than one-half of the agreed purchase-price for said land, and said amounts have either been received by you or still remain in Russell & Holmes' hands subject to your order. Mr. Libby renews or continues his offer, heretofore made, to execute, acknowledge, and deliver to you or your order a mortgage on said land to secure all unpaid installments not due and fully perform each of his obligations in said contract mentioned, and demands a deed as provided in said contract. Will you execute and deliver said deed at once under said terms?

Truly, S. P. DAVIDSON,
Attorney for Jacob Libby.

[Endorsed:] Exhibit "N." Filed July 13th, 1887. J. S. Harris, notary public.

Plaintiff offers the same in evidence.

Obj. 1.—Objected to by defendant as immaterial.

In reply to this letter, about the 8th day of February I received a letter from Mr. Cheney, the defendant, dated February 7th, 1887. This letter I now hold in my hand. It is in Mr. Cheney's handwriting and is signed by him. I am acquainted with Mr. Cheney's handwriting. I have corresponded with him in reference to other matters and invariably received letters from him in the same handwriting as this letter.

47 I now hand this letter to the notary and ask that it be attached as a part of my deposition.

The said letter is attached hereto, marked Exhibit "O."

PLAINTIFF'S EXHIBIT "O." P. D. Cheney.

CHENEY *vs.* LIBBY.

JERSEYVILLE, ILLINOIS, *Feb. 7th*, 1887.

Judge S. P. Davidson, Tecumseh, Neb.

DEAR SIR: Yours of 4th rec'd, and in answer I deny each and every allegation therein contained and respectfully decline all your propositions.

The position of this case is precisely where we expected it would be after a trial before a jury.

I would be glad to accommodate you, but to do so would ruin my appeal.

Yours truly, P. D. CHENEY.

[Endorsed:] Exhibit "O." Filed July 13th, 1887. J. S. Harris, notary public. Book K, page 53.

Plaintiff offers said letter in evidence.

Obj. 2.—Objected to as immaterial by def't.

I have examined all the letters identified by Jacob Libby, in his deposition taken this day, as being in the handwriting of defendant Cheney, and I now testify that each one of said letters is in the handwriting of defendant, said Cheney.

[SEAL.] S. P. DAVIDSON.

Subscribed in my presence and sworn to before me this 13th day of July, A. D. 1887.

J. S. HARRIS,
Notary Public.

(5.) Plaintiff's demand.—Plaintiff here demands of said defendant that he produce the original letter written by S. P. Davidson

48 to him, above mentioned, dated February 4th, 1887, either now or within four days from this date, that the same may be

introduced in evidence herein or a copy thereof made for that purpose.

Not being able to complete the taking of said depositions (by reason that there is not time to complete the taking of the same to-day) I adjourn the further taking of the same till to-morrow morning, July 14th, A. D. 1887, at the hour of nine o'clock in the forenoon, then to be continued at the same place.

[SEAL.] J. S. HARRIS,
Notary Public.

Pursuant to adjournment, as above stated, on the 14th day of July, A. D. 1887, at the hour of nine o'clock in the forenoon, at the same place, I resumed the taking of suid depositions as aforesaid, viz:

J. S. HARRIS,
Notary Public.

And the said CHAS. A. HOLMES, being about the age forty-seven years and having been by me first cautioned and sworn to testify the truth, the whole truth, and nothing but the truth in the matter of controversy aforesaid, I did carefully examine the said CHAS. A. HOLMES, and he did thereupon depose, testify, and say as follows, viz:

Int. 1. State your name, age, residence, and occupation, and how long have you been engaged in that business.

Ans. 1. Chas. A. Holmes; age, 47 years; Tecumseh, Johnson Co., Neb.; one of the firm of Russell and Holmes, bankers; been in the banking business ever since 1871.

Int. 2. Are you acquainted with the parties to this suit?

Ans. 2. I am.

Int. 3. State whether during the time you have been in business, as you have above stated, you have done any banking business for the defendant; and, if so, state the extent or amount of business, as near as you can. Now state it.

Obj. 1.—Objected to as immaterial, and the latter part of the question as incompetent, by defendant.

Ans. 3. Since the year 1872 down to the present time we
49 have collected notes belonging to Mr. Cheney, and during the greater portion of that time he has kept an account with our bank.

Int. 4. State whether or not Mr. Cheney has been accustomed, in his transactions relating to his lands and other business in Southeastern Nebraska, to have the notes which he has taken to himself made payable at the bank of Russell & Holmes.

Obj. 2.—Objected to as incompetent and immaterial by defendant.

Ans. 4. During the first few years we were collecting for Mr. Cheney his notes were made payable at his office, in Jerseyville,

Illinois, but for a number of years past his notes have been made payable at our bank.

Int. 5. State what his custom was in this regard in May and June, 1880.

Obj. 3.—Objected to as immaterial by defendant.

Ans. 5. Those notes were made payable at our bank.

Int. 6. State whether or not your firm has ever done any business for the plaintiff, except in relation to the contract now in controversy.

Obj. 4.—Objected to as immaterial by defendant.

Ans. 6. No; not to my knowledge.

Int. 7. Please state, if you now remember, how all of the notes in connection with this controversy which have been paid, up to and including those due May, 1884, have been paid.

Obj. 5.—Objected to as immaterial by defendant.

Ans. 7. I am not able to say from recollection how they were paid.

Int. 8. State whether Mr. Cheney ever demanded the gold or national currency in payment of any of the notes mentioned in the last question.

Ans. 8. He did not. The notes were either paid by currency or draft and the amount placed to his credit.

Int. 9. State, if you now recollect, how the notes due May 28th, 1885, were paid.

Obj. 6.—Objected to, as the notes have never been paid by defendant.

Ans. 9. We received a draft made by James Stewart, banker, at Madison, and drawn on the First National Bank of Omaha, Nebraska, and made payable to our firm, to pay the notes due May 28th, 1885.

Int. 10. (Handing witness draft marked "G" and attached as part of Jacob Libby's testimony taken yesterday.) State whether or not this is the draft you received as mentioned in your last answer.

Ans. 10. It is.

Int. 11. State whether or not immediately upon the receipt of this draft you notified the defendant that the money had been received at your bank in payment of said notes due May 28th, 1885.

Ans. 11. We notified Mr. Cheney by mail on that day or the day following—I mean May 28th, 1885. We received the draft May 28th, 1885.

Int. 12. State what occurred later in the afternoon, June 1st, 1885, in reference to these notes.

Ans. 12. Mr. Cheney came to our bank in the afternoon, about 3 o'clock. After some time spent in conversation and the transaction of some other business, he presented the Libby notes, due on that day, and demanded payment. We refused to pay the notes in United States funds; offered to pay him in current funds, which he refused. This was 4 o'clock or after the curtains had been drawn up,

at this time, and the door shut. He then called Mr. Chapman, who was standing in the bank, who had been there some time; he
51 handed him the notes and directed him to protest them. Chapman presented the notes to me for payment. I was then behind the counter, and I offered to pay him in the same currency I had offered to pay Mr. Cheney. He declined to receive anything except United States notes or legal-tender funds. Then he went away.

Int. 13. What did Mr. Cheney then say about coming in the next morning?

Obj. 7.—Objected to as immaterial and incompetent by defendant.

Ans. 13. Before he left he said he would call in the morning.

Int. 14. State who had procured the attendance of Mr. Chapman.

Ans. 14. Well, he did not come at our solicitation; he came with Mr. Cheney, or very soon afterwards.

Int. 15. State what, if anything, Mr. Cheney or those in his interest had done that day about drawing out legal-tender notes or gold from your bank.

Obj. 8.—Objected to as immaterial by defendant.

Ans. 15. Why, soon after dinner—about 2 o'clock that day—a gentleman, whom I recognized as having been one of Mr. Cheney's attorneys, came into the bank and asked if we could let him have $5,000 in legal-tender notes in exchange for other currency. We made the exchange for him. Mr. Cheney was in after this and had some checks cashed while he and I were in the private room together, and asked, as an accommodation, that I pay him in legal-tender notes. I did pay him $2,500 in gold and legal-tender notes. He also asked for $2,500 more on another check drawn by the same party. This I declined to pay in such funds, and he said all right. Soon after this he presented the Libby notes for payment. The checks upon which I had paid the $2,500, as before stated, and the $2,500 check which I refused to pay were drawn by A. W.
52 Cross upon us against a deposit made by him May 28th, 1885, all in current funds and quite a portion of it in bills of the First National Bank of Jerseyville, Illinois, of which bank Mr. Cross was president or cashier.

Int. 16. State whether you exacted from Mr. Cheney or from the attorney any pay for the legal-tender notes and gold having been paid instead of current funds.

Ans. 16. I did not. Mr. Evert, who got the $5,000, asked me what my charges were, and I told him I should make no charge. He gave me $10, and said the exchange was worth something to him, as he wanted the United States currency to make tender. I took the money. Nothing was said by Mr. Cheney about paying for any exchange.

Int. 17. State whether, as a matter of fact, you had then remaining in your bank plenty of gold and legal-tender notes to pay the Libby notes.

Ans. 17. We had; and in about fifteen or twenty minutes after

Mr. Cheney and Chapman left I went to Chapman's office to find Mr. Cheney or the notes for the purpose of paying them in the funds Mr. Cheney demanded.

Int. 18. State whether or not you then offered to pay Mr. Chapman the gold or legal-tender notes in payment of the Libby notes if he would surrender them, and state what Mr. Chapman said.

Ans. 18. I asked Mr. Chapman if he had the Libby notes. I told him I had concluded to pay them in United States notes or gold and was ready to do so if he had them. He said Mr. Cheney had the notes and had gone.

Int. 19. What effort did you then make to find Mr. Cheney?

Ans. 19. I went to the hotel and other places about town, but was not able to find him. I also made inquiry for him. I was informed that he had left town by team.

Int. 20. State whether this draft which you have identified
53 was sufficient to call for legal-tender notes or gold and whether you have not always been ready and willing to pay gold and legal-tender notes upon it.

Ans. 20. We could have demanded and received gold or United States notes from the 1st National Bank, at Omaha, in payment of the draft. The draft is sufficient for that purpose. We had been ready and prepared to pay the gold or United States notes upon this draft since the draft was received.

Obj. 9.—Answer objected to as indefinite and evasive by defendant.

Int. 21. State whether the money thus received has remained in your bank ever since the receipt of this draft to pay said notes and whether it does not now so remain.

Obj. 10.—Objected to as incompetent and immaterial by defendant.

Ans. 21. Ever since the receipt of that draft we have had United States notes and gold to pay the amount it calls for in payment of these notes; have the funds now, and have always been ready and willing to pay the notes on demand.

Int. 22. State whether or not, just before the two notes mentioned in the contract due May 28th, 1886, became due, Mr. Libby paid the amount of said notes into your bank to pay the same and whether said amount has not ever since remained and does now remain in your bank, subject to Mr. Cheney's order, in payment of said notes.

Obj. 11.—Objected to as immaterial and leading by defendant.

Ans. 22. We received the money May 27th, 1886, to pay the notes due May 28th, 1886. The funds have been in our bank and are now there to pay said notes and is subject to Mr. Cheney's order on presenting the notes.

Int. 23. State whether or not the money has been paid into your bank to pay the notes mentioned in said contract due May

54 28th, 1887, and whether the same still remains there subject to Mr. Cheney's order in payment of said notes.

Obj. 12.—Objected to as immaterial and leading by defendant.

Ans. 23. We received the — May 24th, 1887, to pay the notes due May 28th, 1887. The funds are now in our bank and have been since they were paid, subject to the order of Mr. Cheney in the payment of the notes.

Int. 24. State whether or not you notified Mr. Cheney of the payment of this money, both of May, 1886, and May, 1887.

Obj. 13.—Objected to as immaterial by defendant.

Ans. 24. We did notify Mr. Cheney in May, 1886, and May, 1887, that we had the funds to pay the notes in legal-tender notes or gold.

Int. 25. State whether or not, soon after June 1st, 1885, any one representing Mr. Libby came to Tecumseh in search of Mr. Cheney and of the notes due in 1885; and, if so, state who it was and what effort he made to find Mr. Cheney and said notes.

Ans. 25. I have no personal knowledge.

Int. 26. State whether Mr. Cheney or any one for him, at any time after June 1st, 1885, has ever asked for the money, either in legal-tender notes or in any other currency or gold, in payment of the notes due in 1885 or any notes due subsequent to that date.

Obj. 14.—Objected to as immaterial by defendant.

Ans. 26. Neither Mr. Cheney nor any one for him, since June 1st, 1885, has asked for the money in the payment of any of the Libby notes.

Cross-examination, J. H. McIntosh representing counsel for defendant:

Int. 1. How long have you personally known Mr. Cheney, Mr. Holmes?

Ans. 1. Twelve or fourteen years.

55 Int. 2. Did he personally call at your bank to receive payment on the notes made in pursuance of the contract now in question at any time previous to May 28, 1885?

Ans. 2. He did not, *at* my knowledge.

Int. 3. Did you pay these notes to any agent of the defendant at your bank?

Ans. 3. I think not. My recollection is that the proceeds of the notes were placed to Mr. Cheney's credit and checked out by him in the usual course of business.

Int. 4. Then he never personally called at your bank to receive or demand payment for any of these notes previous to May, 1885?

Ans. 4. No.

Int. 5. You say you notified him at once, upon receipt of the draft from Mr. Libby in May, 1885, that the money had been received to pay the notes falling due in that month?

Ans. 5. Yes, sir.

Int. 6. Had you actually received the money from Mr. Libby or was it not the fact that you had only received a draft from him?

Ans. 6. We had received the draft which has been offered in evidence and had accepted it for the amount of money it calls for.

Int. 7. You say Mr. Cheney called at your bank when these notes were due, the last day of grace, and demanded payment, presenting the notes?

Ans. 7. I do.

Int. 8. He demanded legal tender?

Ans. 8. He did.

Int. 9. And you refused to give it?

Ans. 9. I did.

Int. 10. He then caused the notes to be protested for non-payment?

56 Ans. 10. He did.

Int. 11. The notes were presented at your bank on the last day of grace by Mr. Chapman, a notary public, at the close of the business hours, and payment thereof was demanded from you at your bank, where said notes were made payable, and payment thereof was then and there refused by it?

Ans. 11. The notes were presented on the last day of grace, after the closing of business hours, and payment demanded of me by Mr. Chapman, a notary public, and I offered to pay him the amount due him on the notes in current funds, which he refused to accept. He then went away, taking the notes with him.

Int. 12. The notary demanded of you payment in legal tender, did he not?

Ans. 12. He did.

Int. 13. And you refused to pay it?

Ans. 13. He did, and I refused to pay in anything except current funds.

Int. 14. The notes were protested because you refused to pay in legal tender, were they not?

Ans. 14. I don't know about that.

Int. 15. At those times, the last day of grace, when the notes falling due in 1885 under this contract that the notes were presented first by Mr. Cheney and afterwards by a notary public and payment thereof demanded in legal-tender payment, in the sort of money demanded, was it each of those times refused by you?

Obj. 1—Objected to because the same question was fully answered already by plaintiff.

Ans. 15. Payment was refused for the reason that there was evidently an attempt at that time, by Mr. Cheney and others acting with him, to exhaust our supply of legal-tender money.

Obj. 1.—Answer objected to as evasive—witness refuses to answer it directly—by defendant.

57 Int. 16. Then, when you say that after the receipt of the draft from Mr. Libby, on May 28th, 1885, you were at all times ready and willing to pay the notes falling due May 28th, 1885,

in legal tender, you say this in spite of your refusal to pay in legal tender, at a time subsequent to May 28th, 1885, when payment in legal tender was twice demanded?

Ans. 16. What I have said in answer to a similar question is that since June 1st, 1885, we have been ready and willing to pay gold or United States notes to Mr. Cheney in payment of the Libby notes, and that we accepted the draft Mr. Libby sent us for that purpose.

Int. 17. Then it is since the 1st of June, 1885, only that you have been ready and willing to pay the notes in question in legal tender?

Ans. 17. I have already said that I went to Mr. Chapman's office on the 1st day of June, 1885, soon after the bank closed, ready and prepared to pay the notes in the funds which had been demanded by Mr. Cheney and Mr. Chapman, and since that time we have been ready to pay them at any time.

Obj. 2.—Answer objected to by defendant.

Int. 18. Did you tender the money to Mr. Chapman, the notary?

Ans. 18. I did not, because I asked him for the notes and he said he did not have them.

Int. 19. What did you first say to Mr. Chapman when you saw him at his office after his demand of the payment of the notes?

Ans. 19. I asked him if he still had the Libby notes and told him upon reflection, I had concluded to pay them in the funds demanded. He replied that he did not have the notes; that Mr. Cheney had them and had gone. I then went to look for Mr. Cheney.

Int. 20. You say you inquired at the hotel for Mr. Cheney. Was this the hotel where he was stopping?

58 Ans. 20. I could not find that he had stopped at any hotel; my first inquiry was at the Sherman House.

Int. 21. What was the leading hotel in town at that time?

Ans. 21. The Sherman House.

Int. 22. Was not there a Centennial Hotel quite as prominent in town at that time as any other?

Ans. 22. Well, I should say not; it was more of a boarding-house than a hotel.

Int. 23. Wasn't the Centennial such a hotel, as to its location and general appearance, as a stranger in town at that time would be likely to stop at?

Ans. 23. Well, a stranger getting off the train at the depot would be quite likely to stop at the Sherman House for the reason he would pass it on coming up from the depot. I know no reason why a stranger should not go to the Centennial Hotel except that it was further from the depot.

Int. 24. Did you inquire at the Centennial Hotel for Mr. Cheney?

Ans. 24. I did not. I was informed by some one that they had seen him go down the street in an opposite direction, and I went in that direction looking for him.

Int. 25. Did you inquire at the Sherman House whether Mr. Cheney was stopping there or not?

Ans. 25. I did; and remember looking at the register and his name was not on the list.

Int. 26. Then you made no further inquiry at any of the other hotels for him?

Ans. 26. No; I did not.

Int. 27. How many hotels were there in town at that time—about?

Ans. 27. Only the Centennial that I know.

Int. 28. Why did you think there was a conspiracy between Mr. Cheney and his agents to exhaust the legal tender in your
59 bank on the first of June, 1885?

Ans. 28. When Mr. Cross made the deposit on May 28 1885. and during a conversation which followed, while he was i he asked me if we kept a legal-tender revenue, as nati were required to do. I said no, but that we usually h of legal tender on hand. When I come to put away the currency which he deposited I noticed that there was no greenbacks or legal tender in the packages. On the 1st of June Mr. Evert got the $5,000 legal-tender notes from us, and Mr. Cheney following him was very particular to ask if we could not accommodate him with greenbacks or legal-tender notes in payment of the checks drawn by Mr. Cross on that deposit made May 28th.

Int. 29. What could have been their object in exhausting your supply of legal tender?

Ans. 29. Mr. Cheney's object would be so that we could not pay the Libby notes in legal tender, I suppose.

Int. 30. Now, you have testified that when Mr. Cheney demanded payment of the Libby notes you had the legal tender on hand. If you had it on hand why did you not give it in payment of these notes when demanded, and thus frustrate the conspiracy which you suspected to exist between Mr. Cheney and his agents to exhaust your supply of legal tender so that you could not pay the Libby notes in legal tender?

Ans. 30. I had two or three reasons: First, he was not the only customer who might want legal-tender money; second, I thought he was trespassing upon good nature somewhat, and it occurred to me that there was quite a large amount of money deposited in our bank by the clerk of the district court of Johnson county, Nebraska, which had been paid into court by parties in litigation with
60 Mr. Cheney, which funds Mr. Cheney could have drawn if he saw fit to accept the certificates from the clerk of the court, and I preferred to be prepared to pay these certificates on demand, and other deposits payable specifically in legal-tender money, rather than comply with the demands of Mr. Cheney for payment of the Libby notes.

Int. 31. You say you suspected this conspiracy to exist to exhaust your legal-tender money so that you could not pay the Libby notes. You evidently expected, then, that legal tender would then be demanded in payment of those notes?

Ans. 31. I did not suspect any conspiracy and did not know he had the Libby notes with him nor did not think about them until

in legal tender, you say this in spite of your refusal to pay in legal tender, at a time subsequent to May 28th, 1885, when payment in legal tender was twice demanded?

Ans. 16. What I have said in answer to a similar question is that since June 1st, 1885, we have been ready and willing to pay gold or United States notes to Mr. Cheney in payment of the Libby notes, and that we accepted the draft Mr. Libby sent us for that purpose.

Int. 17. Then it is since the 1st of June, 1885, only that you have been ready and willing to pay the notes in question in legal tender?

Ans. 17. I have already said that I went to Mr. Chapman's office on the 1st day of June, 1885, soon after the bank closed, ready and prepared to pay the notes in the funds which had been demanded by Mr. Cheney and Mr. Chapman, and since that time we have been ready to pay them at any time.

Obj. 2.—Answer objected to by defendant.

Int. 18. Did you tender the money to Mr. Chapman, the notary?

Ans. 18. I did not, because I asked him for the notes and he said he did not have them.

Int. 19. What did you first say to Mr. Chapman when you saw him at his office after his demand of the payment of the notes?

Ans. 19. I asked him if he still had the Libby notes and told him upon reflection, I had concluded to pay them in the funds demanded. He replied that he did not have the notes; that Mr. Cheney had them and had gone. I then went to look for Mr. Cheney.

Int. 20. You say you inquired at the hotel for Mr. Cheney. Was this the hotel where he was stopping?

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Ans. 22. Well, I should say not; it was more of a boarding-house than a hotel.

Int. 23. Wasn't the Centennial such a hotel, as to its location and general appearance, as a stranger in town at that time would be likely to stop at?

Ans. 23. Well, a stranger getting off the train at the depot would be quite likely to stop at the Sherman House for the reason he would pass it on coming up from the depot. I know no reason why a stranger should not go to the Centennial Hotel except that it was further from the depot.

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Ans. 26. No; I did not.

Int. 27. How many hotels were there in town at that time—about?

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Int. 28. Why did you think there was a conspiracy between Mr. Cheney and his agents to exhaust the legal tender in your
59 bank on the first of June, 1885?

Ans. 28. When Mr. Cross made the deposit on May 28, 1885, and during a conversation which followed, while he was in the bank, he asked me if we kept a legal-tender revenue, as national banks were required to do. I said no, but that we usually had a supply of legal tender on hand. When I come to put away the currency which he deposited I noticed that there was no greenbacks or legal tender in the packages. On the 1st of June Mr. Evert got the $5,000 legal-tender notes from us, and Mr. Cheney following him was very particular to ask if we could not accommodate him with greenbacks or legal-tender notes in payment of the checks drawn by Mr. Cross on that deposit made May 28th.

Int. 29. What could have been their object in exhausting your supply of legal tender?

Ans. 29. Mr. Cheney's object would be so that we could not pay the Libby notes in legal tender, I suppose.

Int. 30. Now, you have testified that when Mr. Cheney demanded payment of the Libby notes you had the legal tender on hand. If you had it on hand why did you not give it in payment of these notes when demanded, and thus frustrate the conspiracy which you suspected to exist between Mr. Cheney and his agents to exhaust your supply of legal tender so that you could not pay the Libby notes in legal tender?

Ans. 30. I had two or three reasons: First, he was not the only customer who might want legal-tender money; second, I thought he was trespassing upon good nature somewhat, and it occurred to me that there was quite a large amount of money deposited in our bank by the clerk of the district court of Johnson county, Nebraska, which had been paid into court by parties in litigation with
60 Mr. Cheney, which funds Mr. Cheney could have drawn if he saw fit to accept the certificates from the clerk of the court, and I preferred to be prepared to pay these certificates on demand, and other deposits payable specifically in legal-tender money, rather than comply with the demands of Mr. Cheney for payment of the Libby notes.

Int. 31. You say you suspected this conspiracy to exist to exhaust your legal-tender money so that you could not pay the Libby notes. You evidently expected, then, that legal tender would then be demanded in payment of those notes?

Ans. 31. I did not suspect any conspiracy and did not know he had the Libby notes with him nor did not think about them until

he presented the notes to me for payment, for if I had I should not have done him the favor of paying him $2,500 in legal-tender money on the checks of Cross, where there was no obligation to pay anything but current funds.

Obj. 3.—Objection to the answer of witness, as not connected with the question and evasive, by defendant.

Int. 32. Is it not a fact that legal tender was at a premium at your bank at the time Mr. Cheney demanded payment of the notes in question?

Ans. 32. No; we received and paid out money without any regard as to whether it was legal-tender funds or national-bank currency.

Int. 33. Is it not a fact that on the very day Mr. Cheney demanded the payment of the notes in question you had received and accepted a premium on legal-tender money at the rate of $2.00 per thousand dollars?

Ans. 33. As I answered before, we made no charge for premium or exchange of United States notes for national-bank currency; the $10 paid by Mr. Everest was a voluntary payment on his part.

Int. 34. But the $10 was paid in consideration for the ex-
61 change of United States national-bank currency for United States currency?

Ans. 34. The $10 was paid and received under the circumstances I have already stated.

Int. 35. That is, you mean that it was accepted by you from a man who was a stranger to you, residing at a long distance from your town, who was not in the habit of doing business at your bank—accepted as a present from him?

Ans. 35. It was accepted because the man insisted on paying for the favor I had done him.

Int. 36. Then it was for the exchange referred to and not as a present?

Ans. 36. I think I have answered that question as far as I can; I have stated the facts.

Obj. 4.—Answer objected to—witness refuses to answer it directly—by defendant.

Int. 37. You say you notified defendant that the legal tender was at your bank to pay the notes due May, 1885. When did you notify him?

Ans. 37. I did not say so.

Int. 38. Then you never notified the defendant at any time during the year 1885 that the legal tender was at your bank to pay the notes due in 1885?

Ans. 38. No; I did not.

Int. 39. When are notes of 1885, and the other made in pursuance of this contract in question, coming due—subsequently to 1885?

Ans. 39. The notes are all in our bank, sent to us by Mr. Libby, and are held subject to the order of Mr. Cheney; the notes of 1885 are among them.

Obj. 5.—Answer objected to, all but the first clause, by defendant.

62 Redirect examination by S. P. DAVIDSON, counsel for plaintiff:

Int. 1. State whether or not you are acquainted with the handwriting of the defendant.

Obj. 6.—Objected to as not proper redirect examination by defendant.

(Handing witness Exhibits "B," "E," "F," "I," and "O," attached to Jacob Libby's deposition just taken.) State in whose handwriting each one of these letters is.

Obj. 7.—Objected to as not proper redirect examination by defendant.

Ans. 1. These letters are in the handwriting of the defendant, P. D. Cheney.

Int. 2. (Handing witness Exhibits "A," "J," "K," "L," and "M," attached to Jacob Libby's testimony just taken.) State in whose handwriting the written portion of each one of these notes, except the signature, is.

Obj. 8.—Objected to as not proper redirect examination by defendant.

Ans. 2. They are each in the handwriting of defendant Cheney.

CHAS. A. HOLMES.

Subscribed in my presence and sworn to before me this 14th day of July, A. D. 1887.

[SEAL.] J. S. HARRIS,
Notary Public.

And the said WARREN H. HOLMES, being about the age of thirty-seven years and having been by me first cautioned and sworn to testify the truth, the whole truth, and nothing but the truth in the matter of controversy aforesaid, I did carefully examine the said WARREN H. HOLMES, and he did thereupon depose, testify, and say as follows, viz:

Int. 1. State your name, age, and residence and occupation.

Ans. 1. Name, Warren H. Holmes; age, 37 years; Tecumseh, Nebraska; occupation, banker. I am a member of the firm
63 of Russell & Holmes.

Int. 2. State whether or not you were present in the bank of Russell and Holmes, in Tecumseh, on the 1st day of June, 1885, when Mr. Cheney presented the Libby notes for payment.

Ans. 2. I was.

Int. 3. State what time in the afternoon it was when he presented said notes and whether it was after banking hours.

Ans. 3. It — about *the* and a little after four o'clock. Our closing hour of bank is four o'clock; it is my recollection the curtains were drawn and the door shut but not locked.

Int. 4. Did you hear the conversation between C. A. Holmes and Mr. Cheney at that time?

Ans. 4. I did not hear the conversation between C. A. Holmes and Mr. Cheney.

Int. 5. State what occurred on the 19th day of August, 1885, if anything, in relation to this contract.

Obj. 1.—Objected to as immaterial by defendant.

Ans. 5. Jacob Libby deposited, by S. P. Davidson, attorney, $120 in gold as a tender for balance of one-half of purchase-money for sections twenty-six and twenty-seven, town. 5, range 8 east, of the sixth principal meridian, and demanded a deed for same from P. D. Cheney, and offered a mortgage on same property for balance unpaid.

Int. 6. State whether at that time Mr. Libby, by his attorney, offered to fully perform any and all other obligations required of him in said contract.

Obj. 2.—Objected to, as immaterial, indefinite, and containing conclusions, by defendant.

Ans. 6. He did.

Int. 7. State whether — not you, for Russell and Holmes, notified Mr. Cheney of this offer and tender and demand.

Obj. 3.—Objected to as immaterial by defendant.

Ans. 7. I did.

64 Int. 8. State whether or not, in compliance to this notice, Mr. Cheney executed and delivered said deed.

Obj. 4.—Objected to as immaterial by defendant.

Ans. 8. He did not, to my knowledge.

Int. 9. State whether or not, immediately after the first of June, 1885, any one representing Mr. Libby came to Tecumseh in search of Mr. Cheney and the notes due in 1885 from Mr. Libby; and, if so, state who it was and what efforts he made to find Mr. Cheney and said notes, and with what result.

Obj. 5.—Objected to as immaterial and incompetent by defendant.

Ans. 9. Mr. James Stewart, the banker, of Madison, Nebraska, came to Tecumseh soon after the 1st of June in the interest of Mr. Libby. He made diligent inquiry for Mr. Cheney and the cause for non-payment of the notes, and to my certain knowledge he did not find either Mr. Cheney or the notes. He was prepared to pay them in legal tender at any time upon presentation. He also made inquiry at the bank of Russell and Holmes for Mr. Cheney and for the notes for the purpose of paying them.

Obj. 6.—Answer objected to by defendant.

Cross-examined by J. H. McIntosh, representing *of* counsel for defendant:

Int. 1. How do you know Mr. Stewart was the agent for Mr. Libby?

Ans. 1. Mr. Stewart had a letter from Mr. Libby introducing him as his agent.

Int. 2. Was you with Mr. Stewart all the while he was there?

Ans. 2. No.

Int. 3. Were you with him at any time while he was here except in your own bank?

Ans. 3. I was.

65 Int. 4. Where were you with him?

Ans. 4. I went with him from our banking office to the office of S. P. Davidson, attorney, and that's all.

Int. 5. Then, how do you know Mr. Stewart while he was here made diligent inquiry for Mr. Cheney?

Ans. 5. Partly on Mr. Stewart's word, and I directed him where to go. He inquired at our place first and then at the notary who presented the notes. I think I directed him to the other bank where some of Mr. Cheney's notes had been.

Int. 6. How do you know that he inquired for Cheney anywhere except at your bank?

Ans. 6. Only from his say so.

Int. 7. Then, when you say Stewart made diligent inquiry for Cheney you mean that Stewart said he made diligent inquiry?

Ans. 7. Yes.

Int. 8. You were not with Stewart except at your own bank and upon the way to Mr. Davidson's office. How is it that you have such certain knowledge, as you say, that he did not find Cheney?

Ans. 8. Mr. Cheney had left the town some days before. Mr. Stewart also said he did not find Mr. Cheney.

Int. 9. Then your certain knowledge about his not finding Mr. Cheney is also based upon mere hearsay?

Ans. 9. I believe it was that he was not here; Stewart said he was not here.

Int. 10. Did Stewart deposit any money in your bank while he was here?

Ans. 10. He did not, to my recollection.

Int. 11. Did he exhibit any money to you while he was here?

Ans. 11. He did not.

Int. 12. How do you know, then, that he has the legal

66 tender with which to pay the Libby notes?

Ans. 12. My recollection was that I offered to furnish him with the legal tender from our bank if he required it.

Int. 13. Then he did not have the legal tender?

Ans. 13. He did not have it with him.

Int. 14. All you know is that if he had needed it your bank might have furnished him with the legal tender?

Ans. 14. Yes.

Int. 15. You don't know Stewart had a cent. of legal tender with him?

Ans. 15. No.

Int. 16. What time in June was it that Stewart was here?

Ans. 16. It was about the 10th of June.

Redirect examination by S. P. DAVIDSON, counsel for plaintiff:

Int. 1. State whether or not it was not about the 8th or 9th of June.

Obj. 1.—Objected to, as witness already said about the 10th of June, by defendant.

Ans. 1. It may have been.

Int. 2. State whether or not you did not offer to furnish Mr. Stewart the legal tender to be used by him for Mr. Libby in paying these notes if they could be found.

Obj. 2.—Objected — as immaterial by defendant.

Ans. 2. I did.

WARREN H. HOLMES.

Subscribed to in my presence and sworn to before me this 14th day of July, A. D. 1887.

[SEAL.] J. S. HARRIS,
Notary Public.

Plaintiff's offer.—Plaintiff here offers to deliver to the defendant a mortgage on the land in controversy, duly acknowledged,
67 to secure the unpaid notes mentioned in the contract, being part of the purchase-money for said land, and notify the defendant that plaintiff will keep this offer good and deliver said mortgage whenever the defendant will deliver the deed for the land or whenever the court shall — or direct in this case.

STATE OF NEBRASKA, } *ss:*
Johnson County, }

In the Circuit Court of the United States for the District of Nebraska.

I, J. S. Harris, a notary public, duly appointed, commissioned, and qualified, and by the laws of the State of Nebraska authorized and empowered to take depositions to be used in causes pending in the circuit court of the United States, do hereby certify that the reasons for taking the foregoing depositions are and the fact is that the testimony of said witnesses is material and necessary for the plaintiff in the cause in the caption of said deposition named, and that the said witnesses live, and did live at the time of taking said depositions, in Platte and Johnson counties, Nebraska, the same being at a greater distance than one hundred miles from Omaha, in the State of Nebraska, the place of the trial of said cause, to wit, more than one hundred miles therefrom, and the testimony is required to be reduced to writing in said cause.

I further certify that, as appears by the notice hereto attached, *and* notice of the time and place of taking the said depositions and the names of the witnesses to be examined were given. I further certify that on the 13th July, A. D. 1887, at the hour of 2 o'clock in the afternoon, I was attended at my office, in Tecumseh, Johnson county,

State of Nebraska aforesaid, by S. P. Davidson, counsel for plaintiff, and J. H. McIntire, representing counsel for defendant, and Jacob Libby, Chas. A. Holmes, and Warren H. Holmes, witnesses, who were of sound and lawful age; and the said witnesses were by
68 me carefully examined and cautioned and sworn to testify the truth, the whole truth, and nothing but the truth; the depositions were by me reduced to writing in the presence of the witnesses and from their statements, and after carefully reading the same to the witnesses they subscribed the same in my presence. I have retained the said depositions in my possession for the purpose of sealing up and directing the same, with this certificate of the reasons aforesaid for the taking said depositions, with my own hand, to the court for which the same were taken.

I do further certify that I am not counsel nor attorney for either of the parties in said deposition and caption named or in any way interested in the event of the said cause named in said caption.

In testimony whereof I have hereunto set my hand and notarial seal this 14th day of July, A. D. 1887.

[SEAL.] J. S. HARRIS,
Notary Public.

Officer's Fees.

Taking & certifying depositions to file (20 cents for each folio of 100 words), 12,535	$25 00
Administering oaths to three witnesses	30
Filing of exhibits (15)	1 50
Witness fees (2 witnesses)	4 00
Witnesses' mileage	20
Postage	20
Paid by plaintiff, total	$31 20

Endorsed: Received & filed Aug. 3, 1887, and opened by order of court Aug. 22, '87. Elmer D. Frank, clerk.

Thereupon, afterwards, to wit, on the 14th day of October, 1887, deposition on behalf of defendant was filed in said case; which said deposition is in words and figures following, to wit:

(*Original.*) *Notice.*

In the Circuit Court of the United States for the District of Nebraska.

69 JACOB LIBBY, Plaintiff,
vs.
PRENTISS D. CHENEY, Defendant.

Deposition *de bene esse.*

Please take notice that the deposition *de bene esse* of Prentice D. Cheney, defendant, and sundry witnesses will be taken, to be read in

evidence at the trial of said cause on the part of the defendant therein, before competent authority, at the office of Adams A. Goodrich, notary public, in Jerseyville, in the county of Jersey and State of Illinois, commencing on the first day of October, 1887, at the hour of nine o'clock in the forenoon of said day, with authority to adjourn from day to day, till all such depositions shall have been completed, at which time and place you are hereby notified to be present and put interrogatories to the said witnesses if you shall think fit.

The reason for taking the deposition is that said witnesses lives at a greater distance than one hundred miles from Omaha, Nebraska, the place of trial of this action.

Dated at Omaha this 19th day of September, 1887.

JNO. L. WEBSTER,
Attorney for Def't.

To S. P. Davidson, Esq., Tecumseh, Neb.

Service of the above notice by receiving a copy thereof on this 23rd day of September, 1887, is admitted, but objection is made to the taking under it of deposition of any other witness than is named therein.

S. P. DAVIDSON,
Sol. for Pl'ff.

70 *Depositions de bene esse.*

UNITED STATES OF AMERICA, }
State of Illinois, County of Jersey, } *ss:*

Be it remembered that on this 1st day of October, A. D. 1887, I, Thomas F. Ferris, a notary public within and for the aforesaid county and State, appointed, duly commissioned, and qualified, and by the laws of the United States authorized and empowered to take depositions in causes pending in the circuit court of the United States, did call and cause to be and personally appear before me, at the office of Adams A. Goodrich, in Jerseyville, in the county of Jersey, in the State of Illinois, Prentiss D. Cheney to testify and the truth to say on the part and behalf of the defendant in a certain suit or matter of controversy now depending and undetermined in the circuit court of the United States for the district of Nebraska, at Omaha, in the State of Nebraska, wherein Jacob Libby is plaintiff and Prentiss D. Cheney is defendant.

And the said PRENTISS D. CHENEY, being about the age of 51 years, and having been by me first cautioned and sworn to testify the truth, the whole truth, and nothing but the truth in the matter of controversy aforesaid, I did carefully examine the said Prentiss D. Cheney, and he did thereupon depose, testify, and say as follows, viz:

Examination-in-chief by Attorney T. S. CHAPMAN, for the defendant:

Interrogatory first. What is your name, age, and residence?
Answer first. My name is Prentiss D. Cheney. I am the defend-

ant in this suit. I am fifty-one years old, and reside in Jerseyville, Jersey county, Illinois.

71 Int. 2nd. Do you know Jacob Libby, the plaintiff in this suit; and, if so, how long have you known him?

Ans. 2nd. I have known him, through business transactions, since May, A. D. 1880. I never saw him until January, A. D. 1887. I did not then have any conversation with him.

Int. 3. Can you state the nature of the business transaction you had with the plaintiff Libby? And, if so, proceed and state the same in your own way in a narrative form.

Answer 3. I can state the nature of the said business.

On the 28th day of May, A. D. 1880, I entered into a written contract to demise and let and also to sell under specified conditions to the plaintiff, Jacob Libby, sections 26 and 27, in township five (5), range eight (8), in Gage county, Nebraska. Each party had a copy of the contract. The copy held by me is in the hands of J. L. Webster, my attorney in this case.

Libby failed to pay two notes for $1,251.20, due May 28th, 1885, at maturity, and the said notes have never been paid to me or to any person having authority to receive payment of same for me.

On Monday, June 1st, 1885, I personally presented the two notes due on that day at the office of Russell & Holmes, in Tecumseh, Nebraska, where they were made payable, and demanded payment thereof in lawful legal-tender money of the United States, which was refused. I thereupon delivered the two said notes to L. C. Chapman, notary public in Tecumseh, Nebraska, and requested him to protest the same, which he did.

When I was in the office of Russell & Holmes I met Charles A. Holmes, a member of that firm. Mr. Holmes then told me that Jacob Libby had sent him a draft, payable in Omaha, with which to pay the said two notes. Mr. Holmes then offered to give me a sight draft on a bank in Omaha in payment for the said notes, which I refused to accept.

72 Mr. Holmes then offered to pay me national-bank notes for the said two notes, which I also refused to receive, and I then informed Mr. Holmes that I would not receive the national-bank notes, because they were not legal-tender money of the United States. I then told Mr. Holmes that I wanted lawful legal-tender money of the United States, and that I would not take anything else in payment of the said two notes. I then told Mr. Holmes that I would accept any lawful money that was a legal tender in payment of the said two notes against Libby, the plaintiff. Mr. Holmes then told me that he did not have legal-tender money with which to pay the Libby notes.

At the same time I had three checks, drawn by A. W. Cross on the bank of Russell & Holmes, for the aggregate sum of $5,000.00, for which I wanted and demanded legal-tender money in payment.

Mr. Holmes paid me $2,500.00 of the amount in gold and United States legal-tender notes, but could not pay the other $2,500 in legal-tender money, he saying that they did not have it in the bank. Mr. Holmes did offer to pay me in national-bank notes, which I refused

to receive, and stated to him that I refused to receive national-bank notes, because they were not legal-tender money.

On June 20th, 1885, I returned to Jacob Libby his twelve (12) unpaid notes, with a letter, of which the following is a copy:

JERSEYVILLE, ILL., *June 20th*, 1885.

Jacob Libby, Esq., Madison, Nebraska.

DEAR SIR: Herein I return to you your twelve unpaid notes, all dated May 28th, 1880, given to me as part of the contract of same date concerning the land—all section 26, 5, 8, all section 27,
73 5, 8—in Gage county, Nebraska, which was terminated and ended by your failure to pay the two notes due May 28th, 1885, and otherwise to comply with the contract, which is now null and void.

Yours truly, P. D. CHENEY.

I afterwards received a letter from Russell & Holmes concerning the same matter, of which the following is a copy:

TECUMSEH, NEB., *June 23rd*, 1885.

P. D. Cheney, Esq., Jerseyville, Ills.

DEAR SIR: * * * Jacob Libby has authorized us to pay the amount of his notes due May 28th, including protest fees, in legal-tender notes or coin, if you so desire, upon presentation, which we are prepared to do. He informed us he would write you to that effect.

Respectfully, RUSSELL & HOLMES.

Afterwards I received another letter from Russell & Holmes, of which the following is a copy:

TECUMSEH, NEB., *June* 29, 1885.

P. D. Cheney, Esq., Jerseyville, Ills.

DEAR SIR: We have received from Mr. Jacob Libby his notes in your favor, amounting to $6,679.20, with a request that we notify you the notes are here, subject to your order.

Yours very respectfully, RUSSELL & HOLMES.

I was absent from home and did not get the letter of June 29th until July 8th, when I immediately replied to it as follows:

JERSEYVILLE, ILLS., *July 8th*, 1885.

Messrs. Russell & Holmes, Tecumseh, Neb.

74 GENTLEMEN: Yours of June 29th rec'd, saying that Jacob Libby has sent to you his notes in my favor for $6,679.20, and that they are subject to my order.

In reply I say that I will not accept the notes, and do not recognize them as being subject to my order.

Yours truly, P. D. CHENEY.

On July 8th, 1885, I received from Jacob Libby a letter, of which the following is a copy:

MADISON, NEB., *June 25th*, 1885.

P. D. Cheney, Esq.

SIR: Your letter of the 20th inst., enclosing my (10) unpaid notes and two which were paid, and which you had protested wrongfully, is received. I refuse to accept said notes, excepting the two which were paid, and I have this day sent them to your bankers, Messrs. Russell & Holmes, of Tecumseh, Neb., for your use and benefit and subject to your order. I shall make payments as fast as they become due, and shall require you to execute a conveyance of the land in accordance with the terms of the contract. It will be useless for you to send me any of these notes, except you send them for payment.

Yours, &c., JACOB LIBBY.

On the next day I replied to the above letter as follows:

JERSEYVILLE, ILL., *July 9th*, 1885.

Jacob Libby, Esq., Madison, Nebraska.

DEAR SIR: Yesterday I received your registered letter of June 25th, informing me that you had sent your unpaid notes to Russell & Holmes, subject to my order, &c.

I now write this note to say that I do not recognize the notes as being subject to my order.

Yours truly, P. D. CHENEY.

75 I afterwards received a letter from Russell & Holmes concerning the same matter, of which the following is a copy:

TECUMSEH, NEB., *Aug.* 20, 1885.

P. D. Cheney, Esq., Jerseyville, Ills.

DEAR SIR: Jacob Libby, by his attorney, makes a tender to us of one hundred and twenty dollars in gold coin as a balance of one-half of the purchase-money for sections twenty-six (26) and twenty-seven (27), in township six (6) north, range eight east.

He offers to surrender contract and deliver mortgage and notes for balance of the purchase-money of said land, as per contract, and to comply with all the conditions required to be performed by him, and demands a deed, as provided therein, of which we are requested to advise you.

Respectfully, RUSSEL & HOLMES.

I immediately replied by writing a letter to Russell & Holmes, of which the following is a copy:

JERSEYVILLE, ILLS., *August 22d*, 1885.

Messrs. Russell & Holmes, Tecumseh, Neb.

GENTLEMEN: Yours of 20th inst. rec'd, saying that Jacob Libby has made a tender to you of $120, gold, and demands a deed for sects. 26 & 27, 6, 8.

In reply I say that I will not receive any money from Mr. Libby, and I refuse to make the deed he asks for.

Yours truly, P. D. CHENEY.

I have never authorized Russell & Holmes or any other person to receive payment of the two notes due in May, 1885. Since my demand for payment, as above stated, I have never authorized Russell & Holmes to accept from Libby the notes said to have
76 been left with them subjeet to my order. I never have and do not now recognize Russell & Holmes as holding the notes for me. Russell & Holmes are not my agents and never have been in my transactions with Jacob Libby or with any other person whatever. I visited Tecumseh on June 1st, 1885, for the purpose of collecting the two notes against Jacob Libby. I was at the office of Russel & Holmes at about 3.30 o'clock in the afternoon. I was in their bank continuously until they closed business for the day and locked their doors, and for some time afterwards. I saw Mr. Holmes on the street after he left his office.

On June 1st, 1885, legal-tender money was worth, in Tecumseh, Nebraska, a premium of two dollars per thousand dollars over and above national bank currency.

Russell & Holmes, on June 1st, 1885, charged and received a premium of ten dollars as the difference in the value of the two kinds of money for exchanging five thousand dollars in legal-tender money for national-bank currency.

This fact was known to me on that day and at that time. Mr. Holmes then told me that he had that same day exchanged $5,000 in legal-tender money for national-bank currency, and I have since heard Mr. Holmes testify on the witness stand in the ejectment suit of P. D. Cheney against Jacob Libby that Russell & Holmes received a premium of ten dollars for making said exchange.

On that occasion I stopped at the new Centennial Hotel, kept by Mrs. Ingraham, which is situated in the block next to the block in which the office of Russell & Holmes is located.

After supper and about seven o'clock in the evening I drove by the residence of Mr. Holmes, about one mile from the city of Tecumseh, and then saw Mr. Holmes sitting on his front porch. Mr.
77 Holmes did not at any time after about 4.30 o'clock p. m., when I departed from his bank, *to* offer to speak to me or hold any communication with me. He knew where I was and must have seen me when I drove by his residence in a buggy, as above stated.

All the original letters and the original press copies of letters written by me to Jacob Libby and Russell & Holmes, mentioned and referred to above, were attached to my deposition taken in the ejectment suit of P. D. Cheney against Jacob Libby, and said letters and said press copies were used on the trial of said ejectment suit in the United States circuit court, at Lincoln, Nebraska, in January, A. D. 1887, since which time I have not seen said letters.

No tender has been made to me to pay the two said notes for $1,251.20 since they fell due. No offer of any kind has ever been made to me to pay the two said notes since they fell due, except the offers requiring me to apply again at the office of Russell & Holmes for payment, as shown in the letter of June 23rd, 1885, written

by Russell & Holmes to me, and subsequent letters to the same effect.

PRENTISS D. CHENEY.

UNITED STATES OF AMERICA, }
State of Illinois, County of Jersey, } *ss:*

I, Thomas F. Ferris, a notary public within and for the aforesaid county and State, duly appointed, commissioned, and qualified, and by the laws of the United States authorized and empowered to take depositions to be used in causes pending in the circuit court of the United States, do hereby certify that the reason for taking the foregoing depositions is and the fact is that the testimony of the said witness is material and is necessary for the defendant in the cause in the caption of the said deposition named, and that the said
78 witness lives and did live at the time of taking said deposition in Jerseyville, in the State of Illinois, the same being at a greater distance than one hundred miles from Omaha, in the State of Nebraska, the place of trial of the said cause, to wit, more than 300 miles therefrom.

I further certify that, as appears by the notice hereto attached, due notice of the time and place of taking the said deposition and the names of the witnesses to be examined *was* given.

I further certify that on the 1st day of October, A. D. 1887, at the hour of nine o'clock in the forenoon, I was attended at the office of Adams A. Goodrich, in Jerseyville, in the county of Jersey, in the State of Illinois aforesaid, by Prentiss D. Cheney; and the witness, P. D. Cheney, being of sound mind and lawful age, and the said witness was by me carefully examined and cautioned and sworn to testify the truth, the whole truth, and nothing but the truth, and the deposition was by me reduced to writing in the presence of the witness and from his statements, and after carefully reading the same to the witness he subscribed the same in my presence.

I have retained the said deposition in my possession for the purpose of sealing up and directing the same, with this certificate of the reasons aforesaid for taking said deposition, with my own hand, to the court for which the same was taken.

And I do further certify that I am not of counsel nor attorney for either of the parties in said deposition and caption named or in any way interested in the event of the said cause named in said caption.

In testimony whereof I have hereunto set my hand and official seal this 1st day of October, A. D. 1887.

[SEAL.] THOS. F. FERRIS,
Notary Public.

79 *Fees of Officer.*

Taking and certifying depositions	$5 00
Administering oaths to witness, 10 cents each	10
Postage	15
	$5 25

Same were paid by Prentiss D. Cheney, def't.

THOS. F. FERRIS,
Notary Public.

Upon the back of said deposition appear endorsements in words and figures following, to wit: No. 365, L. Rec'd & filed Oct. 14, 1887, and opened by order of court Nov. 15, 1887. Elmer D. Frank clerk.

Thereupon, afterwards, to wit, on the 26th day of October, 1887, deposition was filed on behalf of plaintiff in said case; which said deposition is in words and figures following, to wit:

Notice.

In the Circuit Court of the United States for the District of Nebraska.

JACOB LIBBY, Plaintiff, *vs.* PRENTISS D. CHENEY, Defendant.

Deposition *de bene esse.*

Please take notice that the deposition *de bene esse* of James Stuart will be taken, to be read in evidence at the trial of said cause on the part of the plaintiff therein, before competent authority, at the office of James Stuart, in Madison, in the county of Madison and State of Nebraska, commencing on the 25th day of October, 1887, at the hour of 9 o'clock in the forenoon of said day, with authority to adjourn from day to day till all such depositions shall have been completed, at which time and place you are hereby notified to be present and put interrogatories to the said witness if you shall think fit.

The reason for taking the deposition is that said witness lives at a greater distance than one hundred miles from Omaha, Ne-
80 braska, the place of trial of this action, and it is necessary to have the testimony taken and reduced to writing.

Dated at Omaha this 10 day of October, 1887.

SAMUEL P. DAVIDSON,
Sol. for Plaintiff.

To Hon. Jno. L. Webster, sol. for def't.

Service of the above notice, by receiving a copy thereof on this 11th day of October, 1887, is admitted and consent to take said deposition before a notary public is given.

JNO. L. WEBSTER,
Sol. for Def't.

Depositions of witnesses taken before A. J. Thatch, notary public in and for Madison county, State of Nebraska, to be used in an action wherein Jacob Libby is plaintiff and Prentiss D. Cheney is defendant, pending in the circuit court of the United States of America for the district of Nebraska, in pursuance of the annexed notice and at the time and place therein stated.

The plaintiff, Jacob Libby, appeared in his own behalf. The defendant, Prentiss D. Cheney, failing to appear, thereupon said plaintiff produced the following witnesses in their order, to wit:

JAMES STUART, who, being by me first duly sworn, testified as follows:

Int. 1. State your name, age, occupation, and place of residence.

Ans. James Stuart; thirty-five years of age; occupation, a banker; place of residence, Madison, Madison county, Nebraska.

81 Int. 2. How long have you lived at Madison, Nebraska, and how long have you been engaged in the banking business there?

Ans. I have lived at Madison, Nebraska, about seven and a half years and have been engaged in the banking business there during all that time.

Int. 3. Are you acquainted with the plaintiff and the defendant in this cause; and, if so, how long have you known them?

Ans. I know the plaintiff, Mr. Jacob Libby, and have known him about five and a half years. I do not know Mr. Cheney, except by reputation.

Int. 4. Do you know of the fact of the plaintiff having bought two sections of real estate in Gage county, Nebraska, of the defendant?

A. Yes; I seen the contract of purchase.

Int. 5. State if on or about the twenty-eighth of May, 1885, you called at the office of Russell and Holmes, bankers, at Tecumseh, Nebraska, to transact any business for the plaintiff that he had with the defendant. If so, state all the particulars.

Ans. No; not on the 28th of May, 1885, but I was there on the 9th day of June, 1885.

Int. 6. How did you come to go there on the 9th day of June, 1885, and for what purpose?

Ans. I went there at the request of Mr. Jacob Libby, the plaintiff in this case, to settle and pay defendant, Prentiss D. Cheney, two notes, amounting to twelve hundred fifty one and $\frac{2}{100}$ dollars, given him by Libby and payable at the banking-house of Russell & Holmes, at Tecumseh, Nebraska, which Mr. Libby had been notified had been protested for non-payment after I had remitted the money for him to pay them.

Int. 7. When you went to the banking-house of Russell & Holmes at the time stated, state all that was done by you regarding the payment of the two notes you have mentioned.

82 Ans. I got to Tecumseh in the afternoon, at about 2 o'clock p. m., and went at once to the bank of Russell & Holmes and saw Mr. Holmes, who told me that Mr. Cheney was there with the notes June 1, 1885, a few moments before the bank closed, at four o'clock p. m., and demanded payment of them, which they tendered in miscellaneous current money; but Cheney demanded gold or U. S. legal tender and refused to take the current money and had the two notes protested by his attorney, who was also a notary public and who was with him at that time, and he then left the bank. I asked Mr. Holmes if he had seen Mr. Cheney or tried to see him after he had left the bank the day he was there, and he said he went to Chapman's law office about fifteen minutes after Cheney left the

bank and they told him that Cheney had left the town. I then went to Mr. Chapman's office to find out where Mr. Cheney was, and Chapman told me that Mr. Cheney had gone away; that he did not know where he was. I told Mr. Chapman that in behalf of Mr. Libby I was ready to pay the notes in gold and the balance to become due on the contract; but he told me Mr. Cheney did not want the money, but that he wanted the land back.

Int. 8. What other efforts did you make to find Mr. Cheney? State fully.

Ans. Mr. Libby had shown me a letter from Cheney in which he said he would be in Beatrice about 10th of June, and I took the first train out of Tecumseh for Beatrice to see him. In the meantime I had written to Ellis & Knapp, of the People's Bank of Beatrice, while I was on my way to Tecumseh that I wanted to see Mr. Cheney and pay him for the Libby notes, and if he was in town to let me know as soon as I got to Beatrice. I went to see Mr. Willis, who told me that Mr. Cheney had been there and gone away; that
83 Mr. Cheney and he had business together and that he expected Cheney to call on him when he was there. As a matter of fact, the first advice he had that Mr. Cheney was in the country was my letter; that the cashier, Mr. Ewing, had gone to hunt Mr. Cheney up as soon as he got my letter and he found that Cheney had been there several days ago and gone without they seeing him. I went to the two principal hotels and inquired for Mr. Cheney. I found that he had been at one of them, but had paid up his bill and left about a week before that. I went to a lawyer's office in Beatrice—I don't remember the name—at the suggestion of Mr. Ellis, but they knew nothing about him. I then made up my mind that he had left the State, and I gave up search for him.

Int. 9. State if you went prepared to pay Mr. Libby's notes that were held by Mr. Cheney and what instructions you had from Mr. Libby in regard to paying them.

Ans. I had a credit at the First National Bank of Omaha, Nebr., largely in excess of the amount required to pay the notes, and I took with me a blank draft of my bank on the First National Bank of Omaha, which I intended to fill out and sign when I found out the amount due on the notes. I could have procured the gold on the drafts either at Tecumseh or Beatrice. Mr. Libby had made arrangements with me not only to pay the notes, but to pay all money to become due on his contracts of purchase, if Cheney would accept it, and to take up the notes and contract and procure a deed for the land. I had full power to act for Mr. Libby.

Int. 10. State how you came to go to Beatrice in search of Cheney and what date you went there.

Ans. I went there to find Cheney, because I knew he had written Mr. Libby that he would be at Beatrice between the first and tenth of June, 1885, and I thought I might be able to find him there.
84 This was the 10 day of June, 1885, that I was at Beatrice, and the 9th of June that I was at Tecumseh.

Int. 11. Did you have any other business at either Tecumseh or Beatrice than this business of Libby with Cheney?

Ans. No, sir.

Int. 12. Did you go there solely to attend to this business?

Ans. Yes, sir.

Int. 13. You may state if the plaintiff paid you for your services and expenses in making this trip.

Ans. Yes, sir.

Int. 14. When at Tecumseh on the 9th of June, 1885, did you tender payment of these notes at the bank of Russell & Holmes when they were payable?

Ans. I did not, because I had sent the money to Russell & Holmes before the notes were due to pay them, and the money was in their bank then to pay the notes, and I left it there, and it has never been withdrawn from there that I know of.

Int. 15. For what purpose did you search for Cheney in Tecumseh and Beatrice, as you have stated?

Ans. For the purpose, as I said, of paying these two notes of Mr. Libby that Cheney held and taking the notes up; also to pay him the remainder of the purchase-money to become due from Mr. Libby for the land and take a deed from him if he would agree to receive the money, and if he would not take the money on the notes to make him a tender of the amount due.

Int. 16. When did you *learn* Madison, Nebraska, to go to Tecumseh and Beatrice to attend to this business of Mr. Libby?

Ans. It was June 8th, 1885.

Int. 17. Is there any reason why you did not go sooner? If so, state it.

Ans. Yes; Mr. Libby got the notice of the protest of the notes for non-payment Saturday, June 6th, 1885, and not knowing why the notes had been protested after the money had been sent to pay them I took the first train out of Madison, which was on Monday, to attend to the matter.

JAMES STUART.

Subscribed in my presence and sworn to before me this 25th day of October, A. D. 1887.

[SEAL.] A. J. THATCH,

Notary Public within and for Madison County, Nebraska.

STATE OF NEBRASKA, } ss:
Madison County, }

I, A. J. Thatch, a notary public within and for the county of Madison and State of Nebraska, do hereby certify that the above-named witness, James Stuart, whose name is subscribed to the foregoing deposition, was by me first duly sworn according to law to testify the truth, the whole truth, and nothing but the truth in the foregoing-entitled case of Jacob Libby against Prentiss D. Cheney, pending in the circuit court of the United States for the district of Nebraska; that the foregoing deposition by him subscribed was reduced to writing by me and was by said witness subscribed in my presence, and said deposition was taken at the time and place and

between the hours specified in the notice hereto attached and was concluded on the said 25th day of October, A. D. 1887.

Witness my hand and notarial seal hereto subscribed and affixed, at Madison, Madison county, Nebraska, this 25th day of October, A. D. 1887.

[SEAL.] A. J. THATCH,
Notary Public in and for Madison County, Nebraska.

Fees, 1,580 words	$3 15	
" swearing witness	05	
		$3 20
Witness fees:		
James Stuart, 1 day	$2 00	
Mileage, 1 mile	10	
		2 10
Total		$5 30

A. J. THATCH,
Notary Public.

86 Upon the back of said deposition appear endorsements in words and figures following, to wit: No. 365, L. Rec'd & filed Oct. 26, 1887, and opened by order of court Nov. 15, 1887. Elmer D. Frank, clerk.

Thereupon, afterwards, to wit, at the November term of said court, on the 22nd day of November, 1887, the following proceedings were had and done in said cause as appears of record in Journal " M " of said court, to wit:

Decree.

JACOB LIBBY, Complainant,
vs.
PRENTISS D. CHENEY, Defendant. } No. 365, L.

And now, on this 16th day of November, 1887, this cause coming on for hearing, and after the introduction of the proofs and argument of counsel and upon due consideration, the court, being fully advised in the premises, does find all the issues joined in favor of said complainant, Jacob Libby, and against said defendant, Prentiss D. Cheney.

The court further specifically finds that on the 28th day of May, 1880, said defendant entered into a valid written agreement with said complainant to sell and convey to him all of the lands below mentioned for the agreed purchase price of eight thousand nine hundred and sixty dollars, sixteen hundred dollars of which was paid in cash at date of said agreement and the balance was agreed to be paid in eight annual payments of nine hundred and twenty dollars each, due, respectively, in three, four, five, six, seven, eight, nine, and ten years from said date, with interest, as provided in said contract, at six per cent. per annum; that at the

commencement of this suit complainant had paid all installments, both of principal and interest, due up to and including the installments due six years after said date; that he has since paid the installments due seven years after said date as provided in said contract; that said contract provides that
87 when complainant should pay one-half of said purchase price and interest defendant would make and deliver to him a good and sufficient warranty deed conveying said land to complainant; that the payments so made by complainant before the commencement of this suit aggregate more than one-half of said purchase price and interest; that complainant has deposited with the clerk of this court for said defendant a mortgage on said land to secure the payments due eight, nine, and ten years after said date of contract, and has fully done and performed all and every act and obligation to be performed by him mentioned in said contract to entitle him to a deed to said land, and is entitled to a specific performance of said contract on the part of defendant.

It is therefore considered, adjudged, and decreed that said defendant be, and he is hereby, required to make, execute, acknowledge, and deliver to said complainant a good and sufficient warranty deed, containing the usual covenants of warranty (excepting the right of way that may be demanded for public use for railways or common roads), conveying in fee simple said land to complainant, to wit, all of section twenty-six (26) and all of section twenty-seven (27), both in township five (5) north, of range eight (8) east, of the sixth principal meridian, lying and being in Gage county, Nebraska, within forty days from this date; and upon his failure to comply with this decree within said time it is further considered, adjudged, and decreed that this decree shall operate as and have the same force and effect as such deed containing said covenants.

It is further considered and adjudged that said complainant have and recover of and from said defendant the costs herein expended and that he be awarded execution therefor.

To this decree the defendant prays an appeal to the Su-
88 preme Court of the United States, which is hereby allowed, and on which appeal the defendant execute a cost bond in the sum of $250.00.

(S'g'd) DAVID J. BREWER,
Circuit Judge.

Thereupon, afterwards, to wit, on the 21st day of January, 1888, a bond was filed in said case; which said bond is in words and figures following, to wit:

Know all men by these presents that we, Prentice D. Cheney, as principal, and Jno. T. Clark, as surety, are held and firmly bound unto Jacob Libby in the full and just sum of two hundred and fifty dollars, to be paid to the said Jacob Libby, certain attorney, executors, administrators, or assigns; to which payment, well and truly to be made, we bind ourselves, our heirs, executors, and administrators, jointly and severally, by these presents.

Sealed with our seals and dated this 21st day of January, in the year of our Lord one thousand eight hundred and eighty-eight.

Whereas lately at a circuit court of the United States for the district of Nebraska, in a suit depending in said court between Jacob Libby, complainant, and Prentice D. Cheney, defendant, a decree was rendered against the said Prentice D. Cheney, and the said Prentice D. Cheney prayed an appeal, which has been allowed, and having obtained a transcript and filed in the clerk's office of the said U. S. Supreme Court to reverse the said decree in the aforesaid suit, and a citation directed to the said Jacob Libby, citing and admonishing — to be and appear at a Supreme Court of the United States to be holden at Washington on the second Monday of October next:

Now, the condition of the above obligation is such that if the said Prentice D. Cheney shall prosecute his appeal to effect and answer all damages and costs if he fail to make his plea good, then
89 the above obligation to be void; else to remain in full force and virtue.

PRENTISS D. CHENEY.
Per JOHN L. WEBSTER, *His Att'y.*
JNO. T. CLARK.

Approved by—
ELMER S. DUNDY, *Judge.*

26th Jan., '88.

Upon the back of said bond appear endorsements in words and figures following, to wit: No. 365, L. United States circuit court, district of Nebraska. Jacob Libby *vs.* Prentice D. Cheney. Bond. Filed Jan. 21, 1888. E. D. Frank, clerk.

UNITED STATES OF AMERICA, *District of Nebraska,* } *ss:*

I, Elmer D. Frank, clerk of the circuit court of the United States for the district of Nebraska, certify that the foregoing folios, from one to eighty-nine, contain true and faithful transcripts of all pleadings and proceedings of record and on file in my office as said clerk and the whole thereof and the endorsements thereon in the case of Jacob Libby *vs.* Prentiss D. Cheney.

Witness my hand and the seal of said court, at Omaha, this 28th day of February, 1888.

[Seal United States Circuit Court, District of Nebraska.]

ELMER D. FRANK, *Clerk.*

90 *Assignment of Errors.*

In the Supreme Court of the United States.

PRENTISS D. CHENEY, Appellant, *vs.* JACOB LIBBY, Appellee.

Now comes Prentiss D. Cheney, the appellant, and says there is error on the face of the record in this, to wit:

First. The court below erred in finding all the issues joined in favor of complainant Libby and against the defendant Cheney.

Second. The court below erred in finding that the complainant Libby had paid all installments of principal and interest due up to and including installments due six years after date.

Third. The court below erred in finding that the complainant Libby has paid the installments due seven years after date.

91 Fourth. The court below erred in finding that the complainant Libby had before the commencement of this suit paid one-half of the purchase price for the land in controversy.

Fifth. The court below erred in holding that the offer made by Russell & Holmes, on Monday, June 1st, 1885, to pay national-bank notes in discharge of two promissory notes for $1,251.20, then owing from complainant Libby to defendant Cheney, was a sufficient offer or tender of payment, notwithstanding said Cheney's objection and irrespective of said Cheney's demand for payment in lawful legal-tender money of the United States.

Sixth. The court below erred in holding that deposits of money made by complainant Libby with his bankers, Russell & Holmes, constitute payment of promissory notes owing by said complainant Libby to defendant Cheney, such notes being payable at the office of said Russell & Holmes.

92 Seventh. The court below erred in holding that the complainant Libby had fully performed his part of the contract to entitle him to a deed to the land in controversy.

Eighth. The court below erred in holding that the complainant Libby should have and recover the costs herein from defendant Cheney.

Ninth. The decree is contrary to equity.

Tenth. The decree is against the evidence and is contrary to law and the rulings of this Court.

Eleventh. By reason whereof the appellant aforesaid prays that said decree may be reversed, &c.

A. A. GOODRICH,
Sol. for Appellant.

Endorsed on cover: Nebraska C. C. U. S. No. 1071. Prentiss D. Cheney, appellant, *vs.* Jacob Libby. Filed August 27, 1888.

IN THE

Supreme Court of the United States.

OCTOBER TERM, 1889.

No. 724.

PRENTISS D. CHENEY, APPELLANT,

vs.

JACOB LIBBY.

APPEAL FROM THE CIRCUIT COURT OF THE UNITED STATES FOR THE DISTRICT OF NEBRASKA.

APPELLANT'S STATEMENT AND BRIEF.

ADAMS A. GOODRICH,
Attorney for Appellant.

S. P. DAVIDSON,
Attorney for Appellee.

SUPREME COURT

OF THE

UNITED STATES,

October Term, 1888.

No. 1071.

PRENTISS D. CHENEY, *Appellant*,
VS.
JACOB LIBBY, *Appellee.*

Appeal from the Circuit Court of the United States for the District of Nebraska.

STATEMENT OF THE CASE.

This may be called a "Legal tender case." The question arises in this manner:

On May 28th, 1880, the appellant, P. D. Cheney, leased to the appellee, Jacob Libby, 1,280 acres of land in Gage county, Nebraska, the lease containing stipulations under which Libby had the right to purchase the land. Cash payments were due from Libby to Cheney on May 28th in each year after date until 1890. The installments due in 1881, 1882, 1883 and 1884 were paid and received by Cheney. The installment due in 1885 was represented in two promissory notes, one for $920, the other for $331.20, aggregating the sum of $1,251.20.

The last day of grace would ordinarily be on the 31st, but that day being Sunday, the last day of grace under the Nebraska rule was on Monday, June 1st, 1885.

On the last day of grace, Cheney, the appellant, in person, presented the two notes for $1,251.20 at the office of Russell & Holmes, bankers in Tecumseh, Nebraska, where the notes are payable and demanded payment thereof in lawful money of the United States, which being refused, Cheney caused the notes to be protested by a Notary Public.

On June 9, 1885, James Stewart called at the offce of Russell & Holmes with a blank draft on Omaha to pay to Cheney the amount of the two notes protested on June 1st.

No transaction or communication occurred between Appellant and Appellee until June 20th, 1885, when Cheney returned the unpaid twelve notes to Libby in a registered letter and declared the contract null and void.

On June 23d, 1885, Russell & Holmes wrote a letter to Cheney, informing him that Libby had authorized them to pay the amount of his notes due May 28th, including protest fees in legal tender notes or coin *if you so desire*, upon presentation.

On June 25th, 1885, Libby wrote a letter to Cheney informing him that he (Libby) had sent ten unpaid notes to Russell & Holmes, subject to the order of Cheney.

On June 29th, 1885, Russell & Holmes wrote a letter to Cheney, informing him that Libby had left with them his notes subject to the order of Cheney.

Cheney being absent from home did not receive the two letters last mentioned until July 8th.

On July 8th, 1885, Cheney wrote a letter to Russell & Holmes in reply to their letter of June 29th, in which Cheney said he did not recognize the notes as being subject to his order.

On July 9th, 1885, Cheney wrote a letter to Libby, informing him that he did not recognize the unpaid notes left with Russell & Holmes by Libby as being subject to his (Cheney's) order.

On August 20th, 1885, Russell & Holmes wrote a letter to Cheney, informing him that Libby had made a tender to them of $120 in gold coin as the balance of one-half the purchase price of said land; offers notes and mortgage and demands a deed.

On August 22d, 1885, Cheney wrote a letter to Russell & Holmes acknowledging their letter of 20th inst. and refusing to make the deed asked for.

On June 1st, 1885, legal tender money was worth a premium of $2 per $1,000 over national bank currency or drafts. Russell & Holmes had on that day received $10 premium for supplying $5,000 legal tender money in place of national bank currency.

BILL AND ANSWER.

On February 26th, 1887, the Appellee, Libby, filed his Bill in the Circuit Court of the United States for the District of Nebraska, setting forth the execution of the written agreement of May 28th, 1880, and attaching a copy thereof as Exhibit A.

Complainant alleges that he has been in possession of said land under the contract since its execution.

That he promptly paid the installments due in 1884 and prior thereto.

That "On the 28th day of May, 1885, your orator promptly paid the two notes mentioned in said contract maturing on that day, at the bank or office of Russell & Holmes, where the same

made payable, and demanded said notes, but the same were urrendered by defendant, but wrongfully retained by him olation of his said contract, but your orator left the full unt of said notes *in cash*, at said office of Russell & Holmes, nd to be paid to said defendant when he surrendered said s, and said amount has remained at said office for said pur- ever since."

That: On August 19th, 1885, Libby tendered at office of ell & Holmes $120 in gold coin and tendered a mortgage on land to secure the remaining unpaid notes and therefor de- ed a deed for said land.

That: On May 28th, 1886, Libby paid at office of Russell olmes the amount of two notes then due.

"Said orator has fully done and performed each and every gation, promise or undertaking in said contract mentioned to le him to said deed."

That on February 4th, 1887, Libby again offered to fully orm all his obligations and demanded a deed, and that said ney refused to make such deed.

That said Libby has improved said land, has cultivated 1,200 s, has built houses and other buildings thereon.

That unless the court will take cognizance of the matter, r orator will be without adequate relief.

That Libby tenders to Cheney a mortgage on said land to re the unmatured notes, and offers to fully and specifically orm every obligation in said contract, as may be directed by court.

The PRAYER is, that Cheney be required to answer (oath ved), that on hearing, Cheney be required to execute and de-

were made payable, and demanded said notes, but the same were not surrendered by defendant, but wrongfully retained by him in violation of his said contract, but your orator left the full amount of said notes *in cash*, at said office of Russell & Holmes, for and to be paid to said defendant when he surrendered said notes, and said amount has remained at said office for said purpose ever since."

That: On August 19th, 1885, Libby tendered at office of Russell & Holmes $120 in gold coin and tendered a mortgage on said land to secure the remaining unpaid notes and therefor demanded a deed for said land.

That: On May 28th, 1886, Libby paid at office of Russell & Holmes the amount of two notes then due.

"Said orator has fully done and performed each and every obligation, promise or undertaking in said contract mentioned to entitle him to said deed."

That on February 4th, 1887, Libby again offered to fully perform all his obligations and demanded a deed, and that said Cheney refused to make such deed.

That said Libby has improved said land, has cultivated 1,200 acres, has built houses and other buildings thereon.

That unless the court will take cognizance of the matter, your orator will be without adequate relief.

That Libby tenders to Cheney a mortgage on said land to secure the unmatured notes, and offers to fully and specifically perform every obligation in said contract, as may be directed by the court.

The PRAYER is, that Cheney be required to answer (oath waived), that on hearing, Cheney be required to execute and de-

liver to Libby a conveyance for said land, and that in default thereof the decree of court shall operate as a deed; that Cheney be required to pay all costs and for other and further relief.

Thereupon on April 6th, 1887, the Appellant, Cheney, filed his answer wherein he admits:

That on May 28th, 1880, he was the owner in fee simple of said land.

That on said date a contract was executed between Appellant and Appellee but denies that it was a contract of bargain and sale, but that Appellant demised and let to said Libby the possession and use of said land, as fully appears in said contract.

That said Libby agreed to make punctual payments of the sums of money as they became due.

That said contract provides that if Libby should "strictly perform all the agreements and stipulations" in said contract, then said Libby should be entitled to a deed, not otherwise.

That in said contract it is agreed that "time and punctuality are material and essential ingredients."

That it was provided, that if Libby should fail to make payments at the times limited, strictly and literally, without any failure or default, then, the contract should become null and void, *without* any declaration of forfeiture or any act of re-entry or any other act by said Cheney to be performed.

That "Time was made of the essence of said contract" by the terms thereof.

Further answering the defendant (Appellant Cheney) denied that Libby paid the notes due May 28th, 1885, but avers that Cheney presented the notes then maturing at the office of Russell & Holmes in Tecumseh, where said notes were payable

and he then demanded payment thereof, in lawful money of the United States, and that such payment was then refused, and that said notes have never been paid to said Cheney.

That said Cheney has no knowledge of Libby's alleged offer to pay gold coin on August 19th, 1885. That if such offer was made, it was made without the knowledge of Cheney, that said Cheney was not there present, that such offer was made after demand had been made and payment refused of the notes due May 28th, 1885; that said Cheney was not required to leave said notes at the bank of Russell & Holmes after the maturity thereof, and that said Cheney was not obliged to receive payment of said notes from any person after payment thereof had been demanded and refused.

Denies that Libby ever tendered to Cheney a mortgage on said land to secure the unpaid portion of the notes mentioned.

Avers that after the maturity of the notes due May 28th, 1885, said Cheney returned and surrendered to Libby all the unpaid promissory notes mentioned and notified Libby that said contract had become null and void by reason of Libby's failure to pay the notes due on May 28th, 1885.

Denies that said Libby had lawful money of the United States in the bank of Russell & Holmes to pay said Cheney.

Denies that said Libby improved said land with knowledge or consent of said Cheney.

Denies that said Libby has improved said land as alleged.

Further answering, said Cheney offers, if directed by the court, to return to said Libby all money paid to him by said Libby, and to pay a reasonable compensation for all improvements made on said land by said Libby.

Avers that by said contract, said Cheney is entitled to have and to receive from said Libby rent for the use and occupation of said land.

Said Cheney prays an accounting as to the amount of money paid by said Libby, and as to the value of the permanent improvements made by said Libby on said land and of rent due to said Cheney for the use of said land and said Cheney offers to pay to said Libby any sum of money which the court shall order.

Denies that said Libby is entitled to the relief demanded or any part thereof.

Prays advantage of plea or demurrer.

Thereupon, on May 2d, 1887, said Libby filed a replication in the usual form.

Decree for Libby, the Appellee.

No opinion was filed by the Circuit Judge.

The questions presented are: Has the Appellee, Libby, complied with the terms and conditions of his contract as he claims to have done by the allegations of his Bill?

The Appellant, Cheney, insists that the offer made June 1st, 1885, to pay the 2 notes for $1,251.20 was not such an offer as he was bound to accept for the reason that such offer was not made in lawful money of the United States, and that the tender of funds made was refused at the time for the reason then given, that lawful money was required.

Appellant further insists that he, having offered to return all money received, and having offered to pay for the improvements made on the land by said Appellee, the equities are with Appellant and that the Circuit Court erred in granting a decree to Appellee.

APPELLANT'S SPECIFICATION OF ERRORS.

The decree appears on page 56 of the printed record. Therein the court finds that at the commencement of this suit the complainant, Libby, had paid all installments up to and including the installments due six years after date (in 1886); that he has since paid the installments due seven years after date (in 1887).

The Appellant claims that such finding *is erroneous* in view of the evidence, which shows that Appellee, Cheney, has received no money from Libby since the installments due four years after date (in 1884.)

The finding that the complainant, Libby, is entitled to a deed, because he had deposited with the Clerk of the Circuit Court, a mortgage to secure the three last payments *is erroneous*, as it does not place the cash payments said to have been made within the jurisdiction of the court or within the reach of the Appellant Cheney.

The finding of the decree that the complainant "has fully done and performed all and every act and obligation to be performed by him mentioned in said contract to entitle him to a deed" *is erroneous*, as the evidence shows that the Appellant, Cheney, made personal demand for the payment in legal tender money of the U. S. of the two notes for $1,251.20 due in 1885, at the appointed place of payment and that such payment was refused.

The judgment of the court that Appellant should execute and deliver to Appellee a deed for the land in controversy, and that in default thereof the decree should operate as a deed *is erroneous*, as the findings on which it is based are erroneous and the court had no lawful authority to make such decree.

The judgment that Appellant should pay the costs of the suit *is erroneous*, as it should be incumbent on the Appellee to pay costs, if his default in complying with his contract is to be excused by the court in opposition to the claims of the defendant in the original bill.

APPELLANT'S BRIEF.

May it please the Court:

The written contract between Appellant and Appellee appears on page 5 of the printed record. It is a contract under which the Appellee had the right to the possession of Appellant's land, and whereby the Appellee had the right to purchase the land at a fixed price by the strict performance of the terms and conditions stipulated, "time and punctuality are material and essential ingredients in this contract." The purchase price was fixed at $8,960.00 and interest, payable as shown below, viz:

May 28th, 1880,	Date of Contract	$1,600	00
" " 1881,	one year,	441	60
" " 1882,	two years,	441	60
" " 1883,	three years,	1,361	60
" " 1884,	four years,	1,306	40
" " 1885,	five years,	1,251	20
" " 1886,	six years,	1,196	00
" " 1887,	seven years,	1,140	80
" " 1888,	eight years,	1,085	60
" " 1889,	nine years,	1,030	40
" " 1890,	ten years,	975	20

The Appellant admits that the payment due in 1884, as well as all prior payments, were made. This controversy has

resulted from Appellant's efforts to obtain payment of the installment of $1,251.20 due in 1885. The installments were represented by two promissory notes, signed by Appellee, Jacob Libby, payable at the office of Russell & Holmes, in Tecumseh, Nebraska.

Inasmuch as May 31st, 1885, was Sunday, the last day of grace was the following Monday. See Nebraska Statutes, Chapter 41, §8. Days to be observed as holidays * * * "shall be treated and considered as is the first day of the week commonly called Sunday," notes * * * "shall become due and payable on the day thereafter."

§ 3. "All notes * * * shall be entitled to three days grace."

On Monday, June 1st, 1885, the Appellant, Cheney, in person, at the office of Russell & Holmes, demanded payment of the two notes then due for $1,251.20. C. A. Holmes, a witness for Libby, testified on page 33 printed record, Int. 12:

Mr. Cheney came to our bank in the afternoon about 3 o'clock. After some time and the transaction of some other business, he presented the Libby notes, due on that day, and demanded payment. We refused to pay the notes in United States funds; offered to pay him in current funds, which he refused.

On cross-examination, page 37, Int. 7. You say Mr. Cheney called at your bank when these notes were due, the last day of grace, and demanded payment, presenting the notes?

Ans. 7. I do.

Int. 8. He demanded legal tender?

Ans. 8. He did.

Int. 9. And you refused to give it?

Ans. 9. I did.

Int. 12. The notary demanded of you payment in legal tender?

Ans. 12. He did.

Int 13. And you refused to pay it?

Ans. 13. He did, and I refused to pay in anything except current funds.

Upon the same point P. D. Cheney, as a witness in his own behalf testified, see page 47 printed record, "on Monday, June 1st., 1885, I personally presented the two notes due on that day at the office of Russell & Holmes in Tecumseh, Nebraska, where they were made payable and demanded payment thereof in lawful legal tender money of the United States, which was refused. * * * Mr. Holmes then told me that Jacob Libby had sent him a draft payable in Omaha, with which to pay the said two notes. Mr. Holmes then offered to give me a sight draft on a bank in Omaha, which I refused to accept. Mr. Holmes then offered to pay me National Bank notes, which I also refused to receive and I then informed Mr. Holmes that I would not receive the national bank notes because they were not legal tender money of the United States. I then told Mr. Holmes that I would accept any lawful money that was a legal tender in payment of the said two notes against Libby."

We submit to this court that the above cited testimony, given by two witnesses, one for each party, conclusively establishes the fact that the Appellant did present the two promissory notes mentioned, on the last day of grace, at the appointed place of payment and demanded therefor payment in legal tender money of the United States, which was refused; that other

funds were offered, viz: National Bank notes, or a draft; that such funds were refused for the reason then given that the money offered was not legal tender money of the United States.

PREMIUM ON LEGAL TENDER.

The reason why Russell & Holmes refused to pay legal tender money for the two Libby notes is disclosed by the testimony of C. A. Holmes, a witness for Libby, who testified:

On page 34 printed record, Int. 16, "Mr. Evert who got the $5,000, asked me what my charges were and I told him I would make no charge. He gave me $10 and said the exchange was worth something to him, as he wanted the U. S. currency to make tender. *I took the money.*"

Int. 17. State whether you had in your bank plenty of gold and legal tender notes to pay the Libby notes?

Ans. 17. We had.

On page 39, Int. 30, the witness, Holmes, was asked why he did not pay to Cheney legal tender funds for the two Libby notes, he having it in hand.

Ans. 30. I had two or three reasons: First, he was not the only customer who might want legal tender money; second, I thought he was trespassing upon good nature somewhat * * * * and I preferred to be prepared to pay these certificates on demand and other deposits payable specifically in legal tender money rather than comply with the demands of Cheney for payment of the Libby notes.

It is manifest from the testimony of C. A. Holmes, that when the Libby notes were presented by the payee and payment thereof demanded in legal tender money, that Mr. Holmes re-

garded his legal tender funds as being more valuable to him than the current funds which he offered in payment.

Mr. Holmes had the legal tender money on hand and could have paid the Libby notes therewith had he been disposed to do so, but on the same day he had received ten dollars premium for furnishing Mr. Evert with $5,000 legal tender funds in exchange for $5,000 other funds. C. A. Holmes, a witness for Libby, testifies that he was member of the firm of Russell & Holmes. (Page 32, Int. 1.)

PAYMENTS WERE NOT MADE.

The decree finds that Libby has paid the installment due in 1887, and all due prior thereto. This is equivalent to saying that the deposit of a draft made on May 28, 1885 (see Record, p. 33, Int. 11), by Libby, with Russell & Holmes, was an absolute payment and discharge of the notes due on that day, disregarding the fact that Cheney duly presented said notes and demanded payment thereof in legal tender money of the U. S., which payment was refused (see Record p. 37, Int. 8); this occurred on June 1, 1885.

On June 23, 1885, Russell & Holmes informed Cheney by mail that "Jacob Libby has authorized us to pay the amount of his notes due May 28th, *including* protest fees, in legal tender notes, or coin, if you so desire, upon presentation, which we are prepared to do. He informed us he would write you to that effect.

Respectfully, RUSSELL & HOLMES.

(See printed Record, p. 48.)

C. A. Holmes testifies that the funds are yet in the hands of Russell & Holmes (see record p. 35, Int. 21). We call attention

to the fact that this answer is not in harmony with the answers to Int. 7, 8, 9, 12 and 13, on Cross-Examination (see p. 37). It is impossible that both statements of this witness are true.

The conspicuous fact remains that Russell & Holmes refused to pay to the rightful holder and owner the funds, when the same was properly demanded on June 1st, 1885, and on June 23d, 1885, they inform Cheney that Libby has authorized them to pay the notes, "*including protest fees*, in legal tender notes or coin, if you so desire, *upon presentation*, which we are prepared to do."

That is, if Cheney will again present the notes, he can get legal tender money therefor.

We respectfully urge before this Court that such offers of payment are not binding upon Cheney; that the deposit of funds with Russell & Holmes is not a payment, and the facts do not justify the finding of the Circuit Court.

NOTES PAYABLE AT BANK.

This Court decided in *Bank vs. Smith*, 11 Wheaton, 171: "Where a note is made payable at a Bank it is not necessary to make a demand upon the maker. *It is his duty to be at the Bank to pay the same.*"

Bank vs. O'Neal, 2 Cranch C. C., 466: "If a note be payable at a Bank it is sufficient demand of payment if the holder, on the last day of grace, demands payment at the Bank. The *note is dishonored* if the maker has no funds there to pay it."

Burke vs. McKay, 2 Howard, 66. A protest is not necessary.

BANK IS AGENT FOR PAYOR.

Ward vs. Smith, 7 Wallace, 447. "Where a note made payable at a Bank is not lodged with the Bank, whatever the Bank receives from the maker to apply on the instrument, it receives *as his agent* not as agent of the payee."

To the same effect see *Daniels on* N. I., § 326 a, note 3. On same subject see *Adams vs. Hackensack*, 44 N. J. Law, 638, a recent case with many citations.

NOT A TENDER.

Lord Ellenborough held in *Hume vs. Peploe*, 8 East., 168: A tender after the day of payment is not good, as the contract has been broken, and it is no answer to show that at a day subsequent he was ready to pay.

Maynard vs. Hunt, 5 Pick., 240. A tender cannot be made after condition is broken.

Dobie vs. Larkan, 10 Exch., 776. *Poole vs. Tunbridge*, 2 M. & W., 223.

The testimony of Cheney (see record p. 47) shows that the two notes for $1,251.20 due in 1885, have never been paid to him. At bottom of page 50, it is shown that no offer of any kind has been made "*to me*" to pay said notes since they fell due except the offer in the letter of Russell & Holmes, of June 23d, 1885.

The testimony of Holmes (see record p. 35, Int. 21, 22, 23) shows that funds to pay the notes due in 1885, 1886, 1887, are now in the hands of Russell & Holmes. That Cheney has not asked for the money in payment of any of the Libby notes since June 1st, 1885. (See Int. 26.)

MORTGAGE DEPOSITED IN COURT BUT MONEY IS NOT DEPOSITED.

The decree, after finding that Complainant (Libby) had *paid* all installments due seven years after date, continues and finds that Complainant (Libby) has deposited with the Clerk of this Court for said defendant (Cheney) a mortgage on said land to secure the payments due eight, nine and ten years after date, and has fully performed every obligation to entitle him to a deed.

We object to this plan as exceedingly dangerous and unfair. It will be remembered that Libby alleges in his Bill that on August 19th, 1885, he tendered at office of Russell & Holmes $120 in gold and tendered a mortgage on said land to secure the unpaid notes and therefor demanded a deed for said land, (see p. 3 printed record,) of which Cheney was informed by mail, (see printed record, p. 49, letter of Aug. 20th, 1885, from Russell & Holmes to Cheney,) and which offer Cheney refused by replying on Aug. 22d, 1885, (bottom of p. 49.)

We insist that if there was any reason why Libby should deposit a mortgage in Court, that the same reason should apply to the cash payments due in 1885, 1886. and 1887, which the Circuit Court finds were paid by Libby; but which have never been paid to Cheney, as the evidence discloses.

Is it right for the Circuit Court to hand over a mortgage to Cheney and tell him to call on Russell & Holmes for the cash paid to them by Libby and which they once refused to pay to Cheney after he had made a proper demand for it?

If it was equitable that the Court should protect Cheney by requiring Libby to deposit a mortgage to secure the unmatured payments, was it not *a fortiori* incumbent on the circuit court to require Libby to bring his money into court.

It was error for the circuit court to adjudge costs against Cheney, as he has never been in default. This suit arises upon the default of Libby.

The contract provides that upon full performance, Cheney shall ("upon request and the surrender of this contract") make a deed. Even if Libby had performed every stipulation, Cheney was not in default before this suit was commenced. Libby's demand for a deed on Aug. 20th, 1885, of Russell & Holmes (p. 49) is not a demand on Cheney.

Russell & Holmes were not agents for Cheney and there is no rule or usage any where that authorizes Libby to make a demand on Russell & Holmes for a deed instead of demanding it from Cheney direct. The promissory notes given in connection with the contract were made payable at the office of Russell & Holmes, and in no other manner are Russell & Holmes connected with the transaction.

If the notes had been payable at a bank in New York City, can it be said that at such Bank is the place to demand a deed, or the fulfillment of the contract?

We insist that if the default of Libby can be excused by the Court it should be on terms requiring Libby to pay all costs.

Gregg vs. Von Phul, 1 Wallace, 274. Under an executory contract of purchase of land, by a failure to comply with the terms of sale the vendee's possession becomes tortious and ejectment lies at once, though the vendee *may have made valuable improvements* on the land.

In *Stinson vs. Dousman*, 20 Howard, 461. A note was given for the purchase price which the vendee offered to pay after default; acceptance of payment refused. The case bears a

striking likeness to the case at bar. This Court there said: "Where there was a covenant to sell land upon condition that the purchase money should be paid in installments, in failure to perform which, rent was to be charged and the covenatee failed to perform his contract, the *rent was justly chargeable.*"

"Where it plainly appears that the sale is conditional, and its completion is dependent upon the fulfillment of any of the terms with *punctuality* a Court of equity in general will not interpose to relieve the party in default."

An examination of our contract will show that it is a Lease containing a privilege to purchase. The agreement to sell was conditional and entirely optional with Libby. There is no covenant in the entire paper binding Libby to purchase—he agreed to pay annual installments extending over a period of ten years—and it was expressly agreed and understood that in case of default on the part of Libby, that these annual payments, with the taxes, should be regarded and considered as rent for the use of said land. It was further agreed that in case of default and the termination of the contract, that Libby should have no right of reclamation or compensation for moneys paid or services performed, It also sets forth that the right to purchase the land should utterly cease and determine in case of any default. It was distinctly agreed that in case of default Libby should hold the land as a tenant, liable and subject as a tenant. Libby had a complete defense in the clause of the contract defining his liability after default and the forfeiture or annulling of the contract, which is limited to the amount of taxes and the annual notes that might *then be due*, such payments to be regarded and considered as rent for the use of said land. The liability of Libby is fixed and limited by this clause. If the contract of sale should lapse, he was only bound to pay the taxes and such notes

as were then due, when his connection with the contract would cease.

The agreement made is of a mixed character, being partly a lease and in part and an agreement to sell, but the character of lease everywhere predominates.

In *Greene vs. Biddle*, 8 Wheaton, p. 1, it is said: "Where the words of a contract have a plain and obvious meaning, all construction in hostility with such meaning is excluded.

Jennison vs. Leonard, 21 Wall, 302.

"This was one of the sales of Real Estate by contract, so common in this country. * * * The legal title remains in the vendor while an equitable interest vests in the vendee to the extent of the payments made by him. As his payments increase his equitable interest increases."

"The interest of the vendee is equitable merely, and whatever puts an end to the equitable interest,—as notice, an agreement of the parties, a surrender, an abandonment,—places the vendor where he was before the contract was made."

Therefore we say that Libby has an equitable interest in said land, to the extent of the payments made by him, but no more.

The contract passed upon in *Mo. River R. R. vs. Brickley*, 21 Kans., 286, is in its material parts, respecting the contract to convey, identical with ours. The whole subject is there fully examined, and our view of the case at bar is based upon the opinion there given.

It says that in case of default the contract shall become *null and void*, without any declaration of forfeiture or any act of reentry *or any other act* of defendant to be performed. It was *ipso*

facto null and void, it did not require any affirmative act on the part of defendant to terminate the plaintiff's right to a conveyance; having made default he continued as a tenant under the express conditions of the agreement.

Libby constituted Russell & Holmes his agents to make the payments due June 1st, 1885. Their obstinate and stubborn conduct in refusing to pay legal tender money (which Mr. Holmes now testifies they had on hand in abundance), when properly demanded, was the act of Libby, as they were his agents and were acting for him, as declared in *Ward vs. Smith*, 7 Wall, 447.

The circulating notes of National Banks are not a legal tender in the payment of debts between individuals.

Prior to the act of March 3d, 1863, declaring United States Notes to be a legal tender for all debts public and private, Gold and Silver coin was the only legal tender. *Ward vs. Smith*, 7 Wall 447. *Gwin vs. Breedlove*, 2, How, 28.

The order and date of events is as follows:

June 1st, 1885. Installment due, $1,251.20. Payment thereof demanded and the same denied.

June 20th, 1885. Cheney returned unpaid notes to Libby and declared the contract null and void.

June 23d, 1885. Russell & Holmes write to Cheney that Libby has authorized them "to pay his notes due May 28th, *including protest fees*, in legal tender, if you so desire, upon presentation, which we are prepared to do."

June 25th, 1885. Libby deposited the notes with Russell and Holmes, subject to Cheney's order.

July 9th, 1885. Cheney wrote to Libby that he did not recognize the notes as being subject to his order.

Aug. 20th, 1885. Libby tenders to Russell & Holmes $120 in gold, with a mortgage, and therefor demands a deed.

Aug. 22d, 1885. Cheney refuses to receive money from Libby; refuses to make deed.

We respectfully submit that we have sustained our Asssignment of Errors, and that the decree herein should be reversed, and this cause remanded to the Circuit Court with directions.

ADAMS A. GOODRICH,

Attorney for Appellant.

JERSEYVILLE, ILLINOIS,

December, 1888.

NOV 27 1889

IN THE

Supreme Court of the United States.

OCTOBER TERM, 1889.

No. 724.

PRENTISS D. CHENEY, APPELLANT,

vs.

JACOB LIBBY.

APPEAL FROM THE CIRCUIT COURT OF THE UNITED STATES FOR THE DISTRICT OF NEBRASKA.

APPELLANT'S REPLY BRIEF.

ADAMS A. GOODRICH,
Attorney for Appellant.

S. P. DAVIDSON,
Attorney for Appellee.

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SUPREME COURT

OF THE

UNITED STATES,

October Term, 1888.

No. 1071.

PRENTISS D. CHENEY,
Appellant,
VS.
JACOB LIBBY,
Appellee.

Appeal from the Circuit Court of the United States for the District of Nebraska

APPELLANT'S REPLY BRIEF.

May it please the Court:

The appellant desires to point out the errors and inaccuracies and to reply to the arguments found in the brief submitted by the appellee.

On page 12 of his brief the appellee condenses the disputed matters into two "*Points in Controversy.*"

1. Was there a failure on the part of the complainant (*Libby, the appellee*) to comply promptly and strictly with the terms of said contract in making payments due May 28, 1875?

2. If so, was such failure sufficient to warrant a forfeiture of complainant's rights under the contract?

Let us examine these two "*Points in Controversy*" briefly:

First: We show by the contract that the sum of $1,251.20 represented in two promissory notes fell due May 28th, the last day of grace being June 1st, 1885. (Transcript p. 5.) We show by the testimony of C. A. Holmes, a witness for Libby, "that on June 1st, 1885, Cheney came to our bank in the afternoon about 3 o'clock, presented the Libby notes and demanded payment." (*Verbatim*). "We refused to pay the notes in U. S. funds; offered to pay him in current funds which he refused. This was 4 o'clock or after the curtains had been drawn up, and the door was shut." Notes were protested (Transcript p 33, Int. 12).

Further, on cross-examination Mr. Holmes a witness for Libby testified (see Transcript p. 37).

Int. 7. You say Mr. Cheney called at your bank when these notes were due, the last day of grace, and demanded payment, presenting the notes?

Ans. 7. I do.

Int. 8. He demanded legal tender?

Ans. 8. He did.

Int. 9. And you refused to give it?

Ans. 9. I did.

Int. 10. He then caused the notes to be protested for non-payment?

Ans. 10. He did.

We therefore insist that it is proved and must be conceded that there was a failure on the part of Libby to comply with the terms of his contract in regard to the payment of $1,251.20, due on May 28th, 1885.

Second: Such failure was sufficient to terminate the rights of Appellee Libby under the contract. *Because*; by the terms of said contract "time and punctuality are material and essential ingredients"; "time is hereby declared to be the essence of this contract"; "that said Libby agreed to make punctual payments of the sums of money as they became due"; "that if said Libby should fail to make payments at the times limited, strictly and literally, without any failure or default, then, the contract should become null and void *without* any declaration of forfeiture." That Cheney demanded payment at the appointed place when due; that he returned the unpaid notes and notified Libby that the contract was terminated and ended, all of which was done after the default and before any proper offer to perform had been made by Libby. It is said that Libby on June 23d, 1885, authorized Russell & Holmes to pay the amount of his notes due May 28th, *including protest fees* in legal tender or coin, but prior thereto Cheney had returned to Libby his unpaid notes and notified him that the contract was terminated and ended by his failure to pay the two notes due May 28th, 1885, (see the letters of June 20th, 1885, and June 23d, 1885, Transcript p. 48.)

We therefore insist that it is shown that the failure of Libby to make the payment due on May 28th, 1885, was sufficient to justify the termination of the contract which was done by Cheney on June 20th, 1885. (See his letter to Libby dated June 20th, 1885, Transcript p. 48.)

On p. p. 23, 24, of his brief, the Appellee further contends, that there are three reasons why a forfeiture should not be declared even if Libby did fail to perform, viz:

1. All payments due prior to May 28th, 1885, had been made by drafts.

2. That Cheney had by letters of March 19th and May 23d, 1885, waived payment.

3. That Cheney *artfully* and *purposely* prevented Russell & Holmes from paying the notes due May 28th, 1885.

In relation to these three reasons we desire to answer, viz:

First: The allegation is inaccurate, it was not shown that said prior payments were so made. Mr. Holmes testified (Int. 8 Transcript p. 33.) "The notes were paid by currency or draft, and the amount placed to his credit."

Nevertheless, we say it is wholly immaterial how the notes were paid in 1880—1884. The fact that Cheney was willing to receive a draft as payment in 1884, did not preclude his right to ask for actual money in 1885. Especially as it is shown that legal tender funds were then and there worth a premium of $2 per thousand. (See testimony of Holmes, Transcript p. 34, Int. 16.) The refusal of this witness to give full and direct answers to questions on this subject, was objected to by defendant. (See cross-examination, Transcript p. 40, Int. 33—37.)

Second: The letter of March 19th, 1885, from Cheney to Libby is given in full on page 17 of transcript. It is uncertain what the letter refers to, but whatever it may have been, it is manifest that Cheney plainly informed Libby that he "*could not attend* to the matter as you request." The letter of May 23d, 1885, is to be found on page 18 of transcript. It plainly was not an acceptance of any proposition, and it conveyed to Libby

the information that his suggestion depended on the result of enquiries to be thereafter made. It also shows that Cheney's visit to Beatrice was on "*other business.*" The letter does not waive the payment of any notes, nor in any manner change the agreement between the parties. In connection with this subject we wish to quote the following clause from the contract, "No modification or change of this contract can be made *except by entry hereon in writing* signed by both parties" (see Transcript last line of page 6.) We also ask attention to the letter written by Cheney to Libby on May 20th, 1882, it says; "I would prefer to make the deed *according to the terms* of the bond." (Trans. p. 15.)

Wherefore we contend that no waiver is shown.

Third: Appellee charges that Cheney *artfully* and *purposely* prevented Russell and Holmes from paying him in legal tender. The charge is absurd, unjust and unfounded. The testimony of C. A. Holmes, a member of the firm of Russell and Holmes, (Trans. p. 32, Int. 1.) at whose office the notes were made payable testified on behalf of Libby that Cheney came to the bank about 3 o'clock in the afternoon of June 1st, 1885, and remained there until after 4 o'clock and until after the curtains were drawn and the door was shut. Cheney demanded payment of the $1251.20 then due in legal tender money, which was refused, (see Trans. p. 33, Int. 12; Trans. p. 37, Int. 7—13.) Mr. Holmes testifies that he had legal tender money with which to pay, but he refused to pay in such funds because some other customer might want legal tender money, and for other reasons, (see Trans. p. 39, Int. 30).

Therefore we insist that the refusal of Russell & Holmes to pay the notes on June 1st, 1885, is chargable directly and solely

to their perverse and unreasonable obstinacy or stubborness, and undoubtedly with the purpose of receiving $2 per thousand premium on legal tender funds. (Trans. p. 39, Int. 30.)

THE PLEADINGS.

A brief statement of the pleadings will be sufficient to give a clear view of the nature of this controversy. The complainant Libby alleged in his BILL the execution of the contract of May 28th, 1880, and attached a copy thereof as Exhibit A. Thereupon he alleges "*Said orator has fully done and performed each and every obligation* promise or undertaking in said contract mentioned to entitle him to said deed," in addition to which the complainant alleges specific acts by him performed in fulfillment of the contract.

The respondent in his ANSWER sets forth his view of the nature of the contract, and denies that complainant has performed or offered to perform the acts required of him by the contract and he specifies a failure to pay two notes for $1251.20 due on May 28th, 1885, averring that Cheney presented the notes then maturing at the office of Russell & Holmes in Tecumseh, where said notes were payable, and he then demanded payment thereof, in legal tender money of the United States, and that such payment was then refused, and that said notes have never been paid to said Cheney.

The respondent also specifically denies the binding effect upon him of various alleged transactions between complainant Libby and his agents, Russell & Holmes, occurring after the protest of the notes for $1,251.20, on June 1st, 1885. The respondent also offers to return all money paid to him and to pay for all improvements made by Libby.

In reply to respondent's answer the complainant filed the usual REPLICATION, and stands by his original bill. The issue is thus plainly formed, and the pivotal enquiry is: Did the complainant fulfill his obligation in respect to the payment of the installment due on June 1st, 1885?

It will be observed that the claim of Libby as presented by the case in the bill, is one of full and prompt performance on his part; nothing is claimed by way of waiver; the complainant did not aver the facts necessary to show a waiver of the condition precedent and fix the defendant's liability without the performance on his part required by the contract. The complainant is therefore bound to substantiate by proof the truth of the facts alleged in his bill. The proof presented by himself demonstrates beyond the possibility of a doubt that he refused to pay $1251.20, when due on June 1st, 1885, after proper demand therefor. The defense set up in the answer of defendant Cheney is established by the testimony of the witness Holmes, introduced by and on behalf of Libby.

A party seeking specific performance must show himself without fault, or fully excuse any default on his part.

Colson vs. Thompson, 2 Wheat., 336;

Carneal vs. Banks, 10 Wheat., 181;

Boone vs. Mo. Iron Co., 17 Howard, 340.

The contract specifies certain payments to be made by Libby, it provided "That if Libby should fail to make payments *at the time limited*, strictly and literally, without any failure or default, then this contract shall be null and void." In *Greene vs. Biddle*, 8 Wheaton, p. 1, it is said: "When the words of a con-

tract have a plain and obvious meaning, all construction in hostility with such meaning is excluded."

Gregg vs. Von Phul, 1 Wallace, 274. Under an executory contract of purchase of land, by a failure to comply with the terms of sale the vendee's possession becomes tortious and ejectment lies at once, though the vendee *may have made valuable improvements* on the land.

Stinson vs. Dousman, 20 Howard, 461. A note was given for the purchase price which the vendee offered to pay after default; acceptance of payment refused. This Court there said: "Where there was a covenant to sell land upon condition that the purchase money should be paid in installments, in failure to perform which, rent was to be charged and the convenatee failed to perform his contract, the *rent was justly chargeable*."

"Where it plainly appears that the sale is conditional, and its completion is dependent upon the fulfillment of any of the terms with *punctuality* a Court of equity in general will not interpose to relieve the party in default."

MORTGAGE DEPOSITED IN COURT BUT MONEY IS NOT DEPOSITED.

The appellee on page 26 of his brief says the money due in 1885, 1886 and 1887 was, before the entry of the decree, brought into court, as the certificate of the clerk shows.

This statement is a bold violation of the NINTH COMMANDMENT; it is not true; it is *not in the record*; it is a most unblushing attempt to deceive, hoodwink and mislead this Court; it is a weak effort to parry the manifest error in the Circuit Court's decree, the effect of which is to hand over a mortgage to

Cheney and tell him to call on Russell & Holmes for the cash paid to them by Libby which they once refused to pay to Cheney after he had made a proper demand for it.

If there was any reason why Libby should deposit a mortgage in Court, the same reason should apply to the cash payments due in 1885, 1886 and 1887, which have never been paid to Cheney, as the evidence discloses.

RUSSELL & HOLMES INJURED LIBBY.

Libby constituted Russell & Holmes his agents and left money with them to be paid to Cheney on presentation of the notes for $1251.20, due June 1st, 1885, which were payable at the office of Russell & Holmes. Upon proper demand Russell & Homes refused to pay to Cheney the amount of the notes. If Libby has been injured he should seek his remedy against Russell & Holmes, who injured him by refusing to fulfill the purpose of the agency, which they had accepted.

In *Ward vs. Smith*, 7 Wall., 447, it is said: "Where a note made payable at a bank, is not lodged with the bank, whatever the bank receives from the maker to apply on the instrument it receives as his agent not as agent of the payee."

The declarations of Russell & Holmes to Cheney on June 1st, 1885, in reference to the refusal to pay legal tender money for the two notes, were the declarations of Libby.

In *Cliquot vs. United States*, 3 Wall, 114, it is said: "Whatever is said or done by an agent in reference to the business in which he is at the time employed, and within the scope of his authority is said or done by the principal, in all respects as if the principal were the actor or the speaker."

In *Stockwell vs. United States*, 13 Wall., 531, it is said: "The tortious act of the agent is the act of his principal, if done in the course of his agency, though not directly authorized.

In *Am. Fur Co. vs. U. S.*, 2 Peters, 364, it is said: "Whatever an agent does or says in reference to the business in which he is at the time employed and within the scope of his authority is done or said by the principal."

Russell & Holmes are clearly liable to Libby for all damages flowing from their failure to pay the notes.

An agent is liable to his principal for negligence or disregard of orders.

Bell vs. Cunningham, 3 Peters, 69;

Wilcox vs. Plummer, 4 Peters, 174;

Manella vs. Barry, 3 Cranch., 415;

Short vs. Skipwith, 1 Brock. Marsh., 103.

If a loss is incurred by agent's neglect he will be liable for all damages, though his services were gratuitous.

Walker vs. Smith, 1 Wash. C. C., 152; 4 Dall., 389.

The claim advanced by Libby that his agent Holmes called on the Notary Public, and informed him that he was then willing to pay the notes, bears a contradiction on its face, as the Notary had completed his official duty in executing a protest and notice, and had returned the notes to the owner thereof before this alleged call was made.

It is to be noticed that Holmes did not produce the money and offer to make an actual, real payment. He only said to Mr. Chap-

man, the Notary Public, "That he had concluded to pay the notes in the funds demanded." (See Transcript p. 38, Int. 18–19.) Holmes knew that Chapman did not have the notes and that he was perfectly safe in saying that he had concluded to pay them. He was safe in offering payment to a person who could not receive it.

EXTENT OF LIBBY'S EQUITY.

We cannot concede the claim made by Appellee in his brief; we however admit that Appellee Libby has an equitable interest in this land, to the extent of the payments made by him, but his equitable interest is limited to the total sum of all his payments. We contend for this view on the authority of

Jennison vs. Leonard, 21 Wall., 302, which says:

"This was one of the sales of Real Estate by contract, so common in this country. * * * The legal title remains in the vendor, while an equitable interest vests in the vendee to the extent of the payments made by him. As his payments increase his equitable interest increases. * * *

"The interest of the vendee is equitable merely, and whatever puts an end to the equitable interest,—as notice, an agreement of the parties, a surrender, an abandonment,—places the vendor where he was before the contract was made."

In his answer, defendant Cheney offers to return to Libby all money received by him; and to pay for all improvements made on the land, less a reasonable rent, thereby securing to Libby every equity he can claim.

WHEN NOTES ARE MADE PAYABLE AT A BANK, SUCH BANK IS AGENT FOR PAYOR.

We distinctly repudiate the idea insisted upon by appellee on page 28 of his brief, wherein he claims that Russell & Holmes are the agents of Cheney. The first clause of complainant's bill truthfully alleges that he is a citizen of Nebraska and that Cheney is a citizen of Illinois.

The fact is apparent that the notes were made payable in Nebraska, for the *convenience* of Libby, near the land he leased, and much nearer his home than the residence of the payee. It is established that the notes were signed by Libby, with the place of payment appointed therein; that Libby supplied Russell & Holmes with funds with which to pay the notes; that Cheney presented the notes and demanded payment on the last day of grace; that Russell & Holmes then refused to pay the notes in legal tender money of the United States, and thereupon Cheney caused the notes to be protested by a Notary Public. Therefore the case comes fully within the rule announced in

Ward vs. Smith, 7 Wallace, 447:

"Where a note made payable at a Bank is not lodged with the Bank, whatever the Bank receives from the maker to apply on the instrument, it receives *as his agent*, not as agent of the payee"

On same subject see *Daniels on* N. I., § 326 a, note 3.

It borders upon the ludicrous to pretend that Russell & Holmes were agents for Cheney. The claim is not supported by any facts alleged in the bill or shown in the proof.

Russell & Holmes received money from Libby to be paid *by them* to Cheney. Most clearly they accepted the agency and

under it acted for Libby. The event shows that Russell & Holmes sacrificed the interests of Libby with the hope of exacting a premium of $2 per thousand on legal tender funds, but their refusal to pay in lawful money was a refusal by Libby.

THE DECREE.

The appellant Cheney contends that the decree is erroneous as it adjudges that Libby had "*paid* all installments, both of principal and interest due up to and including the installments due six years after date (in 1886); that he has since *paid* the installments due seven years after date (in 1887)." (see printed record p. 57.) This must be error *because* the record shows that it is not true.

The testimony discloses that subsequent to the default and after the return of the unpaid notes and termination of the contract, Russell & Holmes did write to Cheney on June 23, 1885, saying: "Jacob Libby has authorized us to pay the amount of his notes due May 28th, *including protest fees* in legal tender notes or coin, if you so desire, upon presentation, which we are prepared to do." Respectfully,

RUSSELL & HOLMES.

(Transcript p. 48.)

This was the first offer to pay the notes in lawful money, ever made known to Cheney.

The point on which we insist is, that the deposit of funds by Libby with Russell & Holmes was *not a payment*. Libby has never paid or offered to pay *to Cheney* one dollar of the installment due in 1885 or since. He persists in depositing money with Russell & Holmes, and claiming that such deposits are *payments* to Cheney. Manifestly it was error for the Circuit Court

to decree that Libby had *paid* the installments due in 1885 and subsequently.

The following adjudicated cases demonstrate the law on this subject:

Williams vs. Walker, 2 Sand. Chy., 325.

Payment was made to a supposed agent, who did *not have possession* of the securities. *Held*: Not a valid payment.

To same effect see *Turner vs. Hayden*, 4 Barnwell & Cresswell, p. 1; *Same Case* 6 Dowling & Ryland, p. 7.

Dent vs. Dunn, 3 Camp., 296;

Wood vs. Merchants, 41 Ill.; 269;

Adams vs. Hackensack, 44 N. J. Law, 638.

The Appellee, Complainant Libby, is not entitled to a decree for the following eleven reasons:

1. *Because*: His allegation of full and prompt performance is not sustained, but is overcome by the testimony of his own witness, Holmes (Trans. p. 37. Int. 7–10).

2. *Because*: The installment due June 1, 1885, has never been *paid* or *tendered* to Cheney at any time.

3. *Because*: The deposits of money by Libby with Russell & Holmes subsequent to the default and protest on June 1, 1885, were *not payments* to Cheney, nor are they binding on him.

4. *Because:* Every offer to pay made subsequent to the default and protest on June 1, 1885, was coupled with the condition that Cheney should again present his notes at the office of Russell & Holmes in Tecumseh, Nebraska. (Trans. p. 48, Letter of R. & H. to Cheney, June 23, 1885. Trans. p. 35, Int. 21; Trans. p. 50, last paragraph.)

5. *Because*: Default having been made in the payment of the notes due on June 1, 1885, and the same having been protested after legal demand, the office of Russell & Holmes was not thereafter the proper place to make an offer of payment, and Cheney cannot be required to again present the notes at that place.

6. *Because*: Cheney returned to Libby the unpaid notes and declared the contract "terminated and ended," before Libby made his insufficient offer by authorizing Russell & Holmes to pay in legal tender money, including protest fees, *upon presentation.* (Trans. p. 20, Int. 25, Libby as witness; Trans. p. 48, Letters of June 20th, and 23d, 1885.)

7. *Because*: Libby retained the unpaid notes returned to him; Libby's deposit of ten of said notes with Russell & Holmes was promptly rejected by Cheney. (Trans. p. 21, Letter from Libby to Cheney, June 25, 1885, and Reply, Cheney to Libby, July 9, 1885, and Trans. p. 48, Letter Cheney to R. & H., July 8, 1885.)

8. *Because:* The demand for a deed made of Russell & Holmes Aug. 20, 1885, was not a demand on Cheney. (Trans. p. 49, Letter R. & H. to Cheney, Aug. 20, 1885; Trans. p. 3, Bill, line 15.)

9. *Because*: Libby does not show any circumstances that entitle him to the interposition of equity to relieve him from the default. The refusal to pay was the *willful*, intentional and deliberately obstinate act of Russell & Holmes, as agents for Libby, in reference to the business in which they were at the time employed, within the scope of their authority, and Libby is bound by all that was therein said or done by his agents.

10. *Because*: Respondent Cheney offers by answer to account in equity for all money received, all improvements made on the land, and to pay same to Libby under order of Court.

11. *Because*: The equities are with the Appellant Cheney.

In *Becker vs. Smith*, 59 Penn. St., 469, it is said: "Performance at a day may be made of the essence of a contract. A stipulation for performance at a day, when of the essence of a contract is not in the nature of a penalty against which equity will relieve, but one which lies at the root of the agreement and which the party makes a condition *on which he contracts.*"

Morgan vs. Bergen, 3 Neb., 214.

"Parties may make *time* the essence of the contract, so that if there be a default at the day, without any just excuse and without any waiver afterwards, the court will not help the party in default." *Wells vs. Smith*, 7 Paige, 22; *Benedict vs. Lynch*, 1 Johns. Ch., 370.

To the same effect, see;

Lent vs. B. & M. R. R., 11 Neb., 203.

Bass vs. Gilliland, 5 Ala., 761.

Bullock vs. Adams, 20 N. J. Eq., 372.

Stow vs. Russell, 36 Ill., 19.

Phelps vs. I. C. R. R., 63 Ill., 469.

Grigg vs. Landis, 21 N. J. Eq., 494.

Gray vs. Tubbs, 43 Cal., 339.

Campbell vs. Hicks, 19 Ohio St., 433.

Kirby vs. Harrison, 2 Ohio St., 326.

Prince vs. Griffin, 27 Iowa, 514.

Potter vs. Tuttle, 22 Conn., 512.

Englehart vs. Gibson, 56 Ill., 81.

Rogers vs. Saunders, 16, Me., 92.

People's Bank vs. Mitchell, 73 N. Y., 406.

Scott vs. Fields, 7 Ohio, 425.

Milward vs. Earl, 5 Vesey, 720.

Story's Eq. Jur., § 771.

"To entitle a party to specific performance, *he* must show that he has been in no default. * * * If non-compliance goes to the essence of the contract, relief will not be granted." Citing *Hipwell vs. Knight*, 1 Younge & Collyer, 415:

"If parties stipulate for a particular thing to be done at a particular time, such stipulation should be carried into literal effect in a Court of equity. That is the real contract; the parties had a right to make it. Why, then, should a Court of Equity make a new contract which the parties have not made?"

CHRONOLOGICAL TABLE.

The series of important events is as follows, viz:

June 1st, 1885: Installment due; payment of $1251.20 demanded in legal tender funds and the same refused. (Transcript p. 37, Int. 7—13.)

June 20th, 1885· Cheney returned twelve unpaid notes to Libby, and declared the contract null and void. (Transcript p. 48, in letter dated June 20th, 1885; Transcript p. 20, Testimony of Libby Int. 25.)

June 23d, 1885: Russell & Holmes wrote a letter to Cheney saying: "Jacob Libby has authorized us to pay the amount of his notes due May 28th, including protest fees, in legal tender

notes or coin, if you so desire, upon presentation, which we are prepared to do.

Respectfully, RUSSELL & HOLMES.

(Transcript p. 48.)

June 25th, 1885: Libby wrote a letter to Cheney, saying: "That he kept two of the twelve unpaid notes and deposited the other ten notes with Russell & Holmes in Tecumseh, Neb., subject to order of Cheney." (Transcript p. 21. Transcript p. 48. Letter of Russell & Holmes to Cheney.)

July 9th, 1885: Cheney wrote a letter to Libby saying: "I do not recognize the notes as being subject to my order." (Transcript p. 21; Transcript p. 49.)

August 20th, 1885: Russell & Holmes wrote a letter to Cheney saying: "Jacob Libby makes a tender *to us* of $120 gold, with a mortgage and demands a deed." (Transcript p. 49; Transcript p. 3, 16th line.)

August 22d, 1885: Cheney wrote a letter to Russell & Holmes, saying; that he would not receive money from Libby; refuses to make the deed asked for.

We respectfully ask that the decree herein may be reversed and the cause remanded to the Circuit Court with directions.

ADAMS A. GOODRICH,

JERSEYVILLE, ILLINOIS, *Solicitor for Appellant.*

November, 1889.

Of PRUSSING, HUTCHINS & GOODRICH,

Attorneys,

Chicago, Illinois.

Office Supreme Court U. S.
FILED.
JUL 27 1889
JAMES. H. McKENNEY.
CLERK.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1888.

No. 1071.

PRENTISS D. CHENEY, Appellant.

vs.

JACOB LIBBY, Appellee.

APPEAL FROM THE CIRCUIT COURT OF THE UNITED STATES FOR THE DISTRICT OF NEBRASKA.

BRIEF OF APPELLEE.

A. A. GOODRICH,
Jerseyville, Ill.
SOLICITOR FOR APPELLANT.

SAMUEL P. DAVIDSON,
Tecumseh, Nebr.
SOLICITOR FOR APPELLEE.

SUPREME COURT.

—OF THE—

UNITED STATES,

OCTOBER TERM, 1888.

No. 1071.

PRENTISS D. CHENEY, Appellant.

vs.

JACOB LIBBY, Appellee.

BRIEF OF THE APPELLEE.

Statement:

On the 26th day of February 1887 the appellee as complainant filed his bill in the circuit court of the United States for the District of Nebraska against the appellant as defendant praying that said defendant be compelled and required to fully and specifically

perform his several agreements and undertakings in his certain contract for the sale to complainant, of sections 26 and 27 in Township 5, North of Range 8, East in the county of Gage and state of Nebraska, particularly described and set out in said bill and a copy of the same attached thereto as an exhibit, and to execute, acknowledge and deliver to said complainant a good and sufficient warranty deed, conveying said land to him in pursuance of said contract, in fee simple; and in case of defendant's default in making said deed, that the decree of the court should stand for and operate as, and have the full force and effect of such deed; and that complainant have general relief and recover his costs of said defendant.

Said bill alleges that said contract was a contract for the sale of said land to complainant, and that, "the purchase price of said land agreed to be paid to said defendant (appellant) by your orator (appellee) and received by defendant from your orator for said lands, was Eight thousand nine hundred and sixty dollars, to be paid as follows: Sixteen hundred dollars was to be paid at the execution and delivery of said contract and the balance to be paid in ten annual payments, at the times specified in eighteen promissory notes of even date with said contract, eight of which were for nine hundred and twenty dollars each, and to become due, respectively in three, four, five, six, seven, eight, nine and ten years from their date, and were for the balance of the principal of said purchase money. The other ten notes were for the annual interest on the unpaid principal and were as follows: First note for $441.60; second note for $441.60; third

note for $441.60; fourth note for $386.40; fifth note for $331.20; sixth note for $276; seventh note for $220.80; eighth note for $165.60; ninth note for $110.40; and tenth note for $55.20, and due respectively in one, two, three, four, five, six, seven, eight nine and ten years from their date. All of said notes, both for principal and interest were made payable at the bank of Russell & Holmes, Tecumseh, Nebraska, without interest before due and with ten per cent interest after maturity, all of which is provided in said contract."

The bill further alleges that said contract further provides that certain taxes were to be paid by each party; and that complainant should make certain improvements on said land within a certain time.

The bill further alleges that said contract provides that in case said complainant, either by himself or his assigns, should pay or cause to be paid the several sums of money above specified and should do and perform all and singular the agreements and stipulations afore said after their true tenor and effect, then said defendant covenanted and agreed to make, execute and deliver to complainant a deed conveying said lands to him in fee simple with the ordinary covenants of warranty etc., and that said contract further provides that whenever one-half of the purchase price mentioned shall be paid with all accrued interest and taxes, then said Cheney shall execute and deliver the deed as therein contracted for and take notes and a mortgage for the remaining payments, which shall run the unexpired term, as therein fixed. Also that said contract further provides that said defendant should deliver possession of said land to complainant immedi-

ately upon the execution of said contract, thereunder.

The bill further alleges that said contract was duly executed, acknowledged and delivered by said defendant to complainant on May 28th 1880, and on the 26th day of June 1880 complainant filed the same for record in the office of the county clerk of Gage county, Nebraska, and the same was duly recorded in book "D" of the miscellaneous records of said county at page 319 and for greater certainty a copy of same is attached to and filed with said bill, and referred to therein.

The bill further alleges that immediately after the execution of said contract, with defendant's consent, complainant took possession of said land thereunder, which he has ever since retained, and has made all the improvements upon said land mentioned in said contract; that he paid all the taxes required to be paid by him in said contract; that he promptly paid the $1,600 mentioned in said contract at the execution theeeof; that ever since the execution of said contract, complainant has punctually paid each note above mentioned, and mentioned in said contract, both for the principal of said purchase money and for interest as the same became due, and in consideration thereof defendant has promptly cancelled and surrendered to complainant all of said notes maturing on and before May 28th, 1884.

The bill further alleges that on May 28th 1885, complainant paid at the office of Russell & Holmes, where said notes are made payable, the two notes, one for principal and the other for interest, mentioned in said contract and maturing on that day, and demanded

said notes, but defendant wrongfully retained the same in violation of his said contract, but complainant then left the full amount of said notes in cash, at said office for, and to be paid to defendant when he should surrender said notes, and said amount has remained at said office for said purpose ever since.

The bill further alleges that on the 28th day of May, 1886, complainant paid at said office of Russell & Holmes, the full amount of the two notes mentioned in said contract then coming due, in cash, and demanded said notes, but defendant refused to surrender them, and the said amount of money to pay same in full was left by complainant at said office, to be paid to defendant on the surrender of said notes, and the same has remained there for that purpose ever since.

The bill further alleges that the aggregate amount of said purchase price, so paid as above mentioned is largely more than one half thereof, as mentioned in said contract and all interest, and that complainant has paid all taxes due, and has done and performed each and every obligation, promise or undertaking in said contract mentioned to entitle him to said deed; and on February 4th, 1887, complainant again offered to deliver to defendant a mortgage upon said land to secure the unpaid portion of said purchase money and interest and offered to fully perform all his obligations in said contract mentioned, and demanded said deed, which defendant refused and still does refuse to make and deliver; and that the same offer and demand had previously been made on August 19th, 1885, with like result.

The bill further alleges that after complainant took possession of said land under said contract, with the full knowledge and consent of defendant, he began improving the same, and that all the improvements he has made and placed thereon of a substantial and permanent character aggregate in value the sum of *fifteen thousand dollars*, and that unless the court will take cognizance of the case and compel a specific performance by defendant of his obligations in said contract mentioned, complainant will be left without adequate relief.

The bill still further alleges that complainant offers to deliver to said defendant a mortgage on said land to secure the unpaid and unmatured notes, as the court may direct and offers to specifically do and perform every obligation mentioned in said contract to be done by him as conditions precedent to the execution and delivery of said deed as the court may direct; and prays for the relief above stated.

Defendant in his answer admits the making and execution of the contract of which a copy is attached to complainant's bill, (said copy is found in the printed record herein at pages 5 to 7) but denies that it is a contract to sell said lands, and avers it is simply a lease of the lands in controversy.

The answer further avers that it is agreed in said contract, that if complainant should pay the several sums of money "punctually and at the times above limited and shall strictly perform all and singu-

lar the agreements and stipulations" in said contract, then the complainant will be entitled to a deed of conveyance from the defendant and not otherwise, and that "time and punctuality are material and essential ingredients" in said contract, and that "time was made the essence" of said contract.

The answer further alleges that said contract provided, that if complainant should fail to make the payments at the times in said contract limited, or should fail to perform all the stipulations therein contained strictly and literally, then the contract so far as it bound defendant should become null and void and all of complainants rights and interests in said contract created should cease and determine and all right of possession and interest of complainant in the premises should revert to and revest in defendant, without any declaration of forfeiture or any other act of defendant to be performed.

The defendant in his answer denies that complainant punctually paid the notes for principal and interest mentioned in the bill, as they became due; and particularly denies that complainant promptly paid the said notes falling due May 28th, 1885, and avers that complainant failed to pay said notes when defendant presented same, maturing on said day at the Banking House of Russell & Holmes where they were made payable, and that said notes have never been paid to defendant.

The answer further denies that complainant made a demand on said day at said Banking House for said notes, or that defendant wrongfully retained them, and avers that defendant was then at said Bank-

ing House demanding payment of said notes and complainant was not there on said day either to receive said notes or pay same to defendant.

The answer avers that if complainant made a tender at said Banking House of gold coin to any amount on August 19th, 1885, for the use of defendant to be applied on said purchase price, defendant has no knowledge of it and was not there to receive it, but that after he demanded payment of said notes maturing on May 28th, 1885, and such payment was refused defendant took said two notes with him to his home in Jerseyville, Illinois, as he had a right to do, and was not required to receive payment thereof after such payment had been demanded and refused after the maturity thereof.

The answer further denies that complainant tendered a mortgage to secure the unpaid notes; and denies that complainant ever offered to fully perform all his other agreements as provided in said contract to entitle him to a deed for said premises; and denies that he ever demanded such deed; and avers that after payment of said notes due May 28th, 1885, had been demanded and refused, defendant returned to complainant all unpaid notes maturing on May 28th, 1885, and notified him that by reason of his failure to pay said notes maturing on May 28th, 1885, said contract had become forfeited and by its terms it had become null and void.

The answer further denies that complainant now has good and lawful money in said Banking House or elswhere to pay the moneys due defendant on said notes.

The answer further denies that complainant, with the knowledge and consent of defendant, has made improvements upon said land, as alleged, of the value of $15,000.

The answer further avers that defendant is willing, if the court shall so direct, to return to said complainant all moneys paid by him on account of said contract and to pay a reasonable compensation for all improvements made on said land by complainant, and defendant is entitled to receive a reasonable sum as rent for said land.

The answer therefore prays for an accounting of the amount paid by complainant to defendant, and as to the value of said improvements, and of the rent due defendant; and prays leave to be dismissed with his reasonable costs.

The replication is in the ordinary form to put in issue the allegations of the answer.

The cause was tried to the circuit judge and on November 16th, 1887, findings and decree were made and rendered for complainant as prayed (see printed record page 56.) Defendant brings the cause to this court by appeal.

POINTS ADMITTED IN THE PLEADINGS:

1. It is admitted that the contract a copy of which is attached to the complainant's bill, was made, executed and entered into by the parties.

2. It is admitted, because not denied, that complainant, with the consent of defendant, took possession of the land in controversy under said contract.

3. It is admitted that if complainant made the payments punctually at the times mentioned, as alleged in the bill he would be entitled to a deed to the land.

4. It is admitted, because not denied, that whenever one-half the purchase money shall have been paid, if payments shall have been punctually made, the complainant would be entitled to the deed mentioned, on giving the mortgage to secure the unmatured notes.

5. It is admitted, because not denied, that complainant promptly paid the notes maturing on May 28th, 1886, when due, at the office of Russell & Holmes where the same were made payable, and that the lawful money to pay same has remained in said office, for defendant, to pay said notes ever since.

6. It is not disputed that if all the payments have been made maturing on and before May 28th, 1886, more than one-half of the purchase money and interest due has been paid.

7. It is admitted that complainant has paid all taxes required to be paid by him under said contract.

POINTS ADMITTED IN THE PROOFS:

1. It is admitted in the evidence, and in appellant's brief, that complainant punctually made all the payments provided for in said contract, at the times specified therein, which matured on and before May 28th, 1884.

2. It is clearly proven without any contradiction whatever, that complainant made the improvements upon said land as alleged in his bill, of the value of $10,000 (Int. 43 to 45 page 25 of the printed record.)

3. It is clearly proved and not contradicted in the evidence that complainant promptly made the payments due under said contract on May 28th, 1886, (see int. 7 page 14 and int. 22 page 35 of printed record.)

4. It is proved and not disputed in the evidence that complainant has also promptly paid the installments both of principal and interest under said contract which became due May 28th, 1887, (since this suit was commenced but before it was tried and important only as showing what notes the mortgage should have been given to secure.) (See int. 8 page 14 and int. 23 and 24 pages 35 and 36 of the printed record.)

5. It is proved and not contradicted in the evidence that on August 19th, 1885, complainant tendered at said Banking House balance of one-half of said purchase money and a mortgage to secure the one-half unpaid and made an offer of full performance, on his part, of said contract, and demanded the deed which was refused (int. 5, 6, 7 and 8 page 42.)

6. It is proved and not disputed that another

offer of full performance on the part of complainant and demand for the deed was made on February 4th, 1887, which was declined by defendant (see pages 30 and 31 of printed record.)

POINTS IN CONTROVERSY:

The only points really in controversy are:

1. Was there a failure on the part of complainant to comply promptly and strictly with the terms of said contract in making the payments due May 28th, 1885, and,

2. If so, was such failure sufficient under the circumstances provided to warrant a forfeiture of complainant's rights under said contract, to a deed to the land in controversy.

Appellee's Brief and Argument.

I.

Appellee did not Fail to Perform.

May it please the Court:

Before noticing the points suggested by the appellant in his brief, we desire to suggest to the court how strongly both the questions above stated are answered in favor of the appellee by the proofs in the record.

And *first*, in making the payment due in May, 1885, the appellee in fact complied with the require-

ments of the contract. It is conceded that the contract provides that all payments thereunder were to be made at the office of Russell & Holmes in Tecumseh, Nebraska.

The proof shows that this office was selected as the place of payment, at appellant's instance, (See record page 22 int. 34.) That this bank had done business for appellant for several years. That appellant had been in the habit of making this bank the place of payment of his notes taken in other transactions, for several years. (See record page 32 and ints. 3 and 4.) This was appellant's custom in May and June 1880, the time this contract was made (record page 33 int. 5.) Said bank has never done any business for appellee except in relation to this contract (record page 33 int. 6.)

The proof further shows that all the payments made, which came due prior to May 28th, 1885, viz: The payments which came due in May 1881, 1882, 1883 and 1884 respectively, were made by appellee sending ordinary bank drafts to said Russell & Holmes (record page 14 ints. 7, 8, 9 and 10; and page 15 exhibits "A" and "B" and int. 12.) All the notes, paid in this manner, up to and including those due four years after their date, were cancelled and surrendered to appellee (record pages 15 and 16 ints. 13, 14 and exhibit "C.")

The proof further shows that on May 26th 1885, appellee sent a draft for $1,251.20 to Russell & Holmes at Tecumseh in payment of the two notes mentioned in said contract due May 28th, 1885, (record pages 18 and 19, ints. 19 and 20 and exhibit "G.") This draft was received by Russell & Holmes on May 28th, 1885,

for said purpose (record page 33 Mr. Holmes' testimony int. 9 and 10.) This draft was sufficient to call for legal tender notes or gold. Russell & Holmes could have demanded the gold or United States notes from the First National Bank of Omaha upon it. Ever since the receipt of said draft said Russell & Holmes have had the gold or United States notes to pay the amount it calls for in payment of said notes [record page 35 ints. 20 and 21 of Mr. Holmes' testimony.]

The proof further shows that within fifteen or twenty minutes after the notes were formally protested on June 1st, 1885, Mr. Holmes of the firm of Russell & Holmes, went to the office of Mr. Chapman, the notary who protested the notes, to find Mr. Cheney or the notes for the purpose of paying them in the funds Mr. Cheney demanded. He asked Mr. Chapman if he had the Libby notes, and told him he had concluded to pay them in gold or United States notes, and was ready to do so if he had them; but Mr. Chapman informed him that Mr. Cheney had the notes and had gone. Mr. Holmes then tried to find Mr. Cheney at other places in the town, but was informed he had left town by team [record pages 34 and 35, ints. 17, 18, 19 of Mr. Holmes' testimony.]

But appellee does not stop with all this. He sent his banker at Madison, Neb., Mr. Stuart, to Tecumseh and Beatrice in search of Mr. Cheney and the notes to pay them in gold. Mr. Stuart reached Tecumseh, June 9th, 1885. He sought Mr. Cheney and these notes at Mr. Chapman's [the notary] office and elsewhere, and could not find either. He then went in search of Cheney to Beatrice on June 10th. He was prepared to pay the

notes in gold [record pages 53, 54 and 55.] Mr. Stuart started on this trip on the first train out of Madison, Neb., after Mr. Libby received his notice of protest of said notes [record page 55 int. 17.] Mr. Stuart went to Beatrice on June 10th, because Mr. Libby had shown him a letter from Mr. Cheney in which he said he would be in Beatrice about June 1st to 10th [record page 54 int. 8 and 10.] We will make further reference to this letter further on.

But appellee went still further in his efforts to take up these notes. On June 12th, 1885, he notified the appellant by letter of that date that the gold was deposited at Russell & Holmes' office to pay the two notes due May 28th, 1885, mentioned in the contract. He says he knows Mr. Cheney received this letter, as he afterward introduced it in evidence on the trial of the ejectment suit in U. S. Court at Lincoln, of *Cheney vs. Libby*, in January 1887. Mr. Cheney admitted, in his testimony in that case, that he received said letter in due course of mail [record pages 19 and 20, ints. 23 and 24.] The appellant all this time still held all of the notes mentioned in the contract which came due after May 28th 1884. He made no effort or pretense of returning the same until June 20th, 1885, eight days after he was notified that the gold was on deposit for him to pay the notes due May 28th 1885 [record page 20 int. 25 and page 48, Cheney's testimony.] It will also be seen that the appellee sent the notes to the bank of Russell & Holmes and notified the appellant that he had done so and they were subject to appellant's order, immediately after he (appellee) received them from appellant [record pages 20 and 21, ints. 26, 27, 28 and 29,

and exhibits "H" and "I."]

Upon the facts last above suggested the Supreme court of Nebraska has declared the law, in the case of *Robinson vs. Cheney* 17 *Neb.* 673, in the 3d syllabus prepared by the court as follows:

"In 1880 certain real estate was sold on time, twenty negotiable notes payable at a particular bank being given by the purchaser, all to be paid within ten years from date. Time was declared in the contract to be an essential element, and on failure of the purchaser to perform a forfeiture should ensue. In November 1882 the purchaser did not pay the taxes until five days after the land had been sold to the defendant for taxes, when the purchaser redeemed the same. The notes due in 1883 were not sent to the bank named for collection, and three days after they were due the purchaser paid the amount thereof to the bank. In June 1884 the vendor returned the unpaid notes to the purchaser and declared the contract forfeited. *Held*, That the alleged forfeiture dated from that time, and the purchaser not then being in default it was unavailing."

In this case the decree of the court below, compelling specific performance of the contract, was affirmed.

II.

IN ANY EVENT A FORFEITURE IS NOT WARRANTED BY THE PROOFS.

Second, we further contend that in any event a forfeiture is not warranted by the facts proved. Courts of equity do not favor forfeitures. It violates every principle of justice to take the property of one man and give it to another without compensation, upon a simple failure to pay at the day, where there has not been gross laches. While in particular cases such forfeitures are sustained, yet they will be denied in all cases where the vendor has directly or indirectly waived the condition on which they depend.

Robinson vs. Cheney 17 *Neb.* 680, 681.

The proof shows that on March 4th, 1885, more than two months prior to the maturity of the notes whose payment is the basis of this controversy appellee wrote to appellant telling him he would pay all the principal notes mentioned in the contract and the interest note due May 28th, 1885, if he would make the deed (record page 16 int. 15.) Appellant replied to this letter as follows:

"GRAND CENTRAL HOTEL,
NEW YORK, MARCH 19th, 1885.

DEAR SIR: Your letter of the 4th has just reached me. I have no papers with me and cannot now attend to the matter as you request. I expect to go to New Orleans to the Exposition and to be at home in time to see to it properly. If I am behind time no harm will come to you.

Yours Truly,
P. D. CHENEY."

(Record exhibit "E" page 17.)

On May 20th, 1885, appellee again wrote appellant that he would like to pay all the principal notes in said contract, and the interest note due May 28th, 1885, if he would make him a deed (record page 18, int. 17.) To this letter appellant replied as follows: (Record page 18 exhibit "F.")

"JERSEYVILLE, ILL., May 23d, 1885.

J. Libby, Esq., Madison, Neb.

DEAR SIR: Yours of the 20th received. I think it probable that I can do as you suggest, but I will be in Beatrice between the 1st and 10th of June on other business and will then make inquiries and see if I can lend the money to good hands and will then let you know more certainly.

Yours Truly,
P. D. Cheney."

It is further proved that, appellant never notified appellee whether he would comply with his request contained in his letter of May 20th, 1885, in accordance with his agreement in above letter. And that appellant never corresponded or conversed with appellee about the matter contained in said letters of May 20th and May 23d, 1885 after the date of those letters. (Record page 19 ints. 21 and 22.)

But notwithstanding, in his letter of March 19th 1885, above mentioned, appellant assures appellee that "If I am behind time no harm will come to you;" and notwithstanding, in his said letter of May 23d, 1885, appellant informs appellee:

"That he would be in Beatrice between the 1st and 10th of June on other business, and will make inquiries and see if I can lend the money to good hands and will then let you know more certainly," (whether he would comply with appellee's request.)

on the 1st day of June he comes into Russell & Holmes' bank near the close of banking hours, and demands legal tender money in satisfaction of the said notes due May 28th, 1885, and then suddenly leaves the town with the notes, so that they cannot be found within twenty minutes thereafter so as to be paid off in legal tender money; and then asks this court to declare a forfeiture in his favor by reason of said conduct.

Appellant's request of the court to declare a forfeiture in his favor, appears still more remarkable, and inequitable, when it is remembered that the parties at the time this demand was made, had been acting under and construing this contract for five years. Four of the ten annual payments had been made and received. Every payment had been made by appellee sending a bank draft to Russell & Holmes, and the appellant either accepting the original draft sent, or else accepting in lieu of it a draft drawn by Russell & Holmes in his favor or the ordinary current funds, or credit at Russell & Holmes' bank. In no instance had the gold or other legal tender currency been demanded by or paid to the appellant.

But there is still another reason why a forfeiture should not be declared in this case. Appellant should not be permitted to reap advantage from his own wrong. If he intentionally mislead the appellee by the correspondence above mentioned, and then purposely and artfully, afterwards contrived to prevent

Russell & Holmes from paying the legal tender money demanded by him on June 1st, 1885, then certainly he is not entitled to have a forfeiture declared on that account. The proof shows that appellant did that very thing [page 34 of record, Mr. Holmes' testimony.]

"Int. 15. State what, if anything, Mr. Cheney or those in his interest had done that day (June 1st, 1885,) about drawing out legal tender notes or gold from your bank.

Ans. 15. Why, soon after dinner–about 2 o'clock –that day, a gentleman, whom I recognized as having been one of Mr. Cheney's attorneys, came into the bank and asked if we could let him have $5,000 in legal tender notes in exchange for other currency. We made the exchange for him. Mr. Cheney was in after this and had some checks cashed * * * and asked, as an accommodation that I pay him in legal tender notes. I did pay him $2,500 in gold and legal tender notes. He also asked for $2,500 more on another check drawn by the same party. This I declined to pay in such funds, and he said, all right. Soon after this he presented the Libby notes for payment. The checks upon which I paid $2,500, as above stated, and the $2,500 check which I refused to pay were drawn by A. W. Cross upon us against a deposit made by him May 28th, 1885, all in current funds and quite a portion of it in bills of the First National Bank of Jerseyville, Illinois, of which bank Mr. Cross was president or cashier."

And then in his cross examination on page 39 of the *record* Mr. Holmes further testifies:

"Int. 28. Why did you think there was a con-

spiracy between Mr. Cheney and his agents to exhaust the legal tender in your bank on the first of June, 1885?

Ans. 28. When Mr. Cross made the deposit on May 28th 1885 and during a conversation which followed while he was in the bank, he asked me if we kept a legal tender reserve (revenue) as National banks were required to do. I said no, but we usually had a supply of legal tender on hand. When I came to put away the currency which he deposited I noticed that there was no greenbacks or legal tender in the packages. On the 1st day of June, Mr. Evert got the $5,000 legal tender notes from us, and Mr. Cheney following him was very particular to ask if we could not accommodate him with greenbacks or legal tender notes in payment of the checks drawn by Mr. Cross on that deposit made May 28th.

Int. 29. What could have been their object in exhausting your supply of legal tender?

Ans. 29. Mr. Cheney's object would be, so that we could not pay the Libby notes in legal tender."

In answer to int. 30 witness explains why he did not pay the Libby notes, when payment was first demanded, in legal tender. These reasons are purely his own and in no way suggested by or emanating from Mr. Libby. His reasons are such as would naturally influence any reasonable man situated as he was, after the courtesy he had already extended to Mr. Cheney.

"Int. 31. You say you suspected this conspiracy to exist to exhaust your legal tender money so that you could not pay the Libby notes. You evidently

expected then, that legal tender would be demanded in payment of these notes?

Ans. 31. I did not suspect any conspiracy and did not know he had the Libby notes with him, nor did not think about them until he presented the notes to me for payment, for if I had I should not have done him the favor of paying him $2,500 in legal tender money on the checks of Cross, where there was no obligation to pay anything but *current funds*."

The purpose on Mr. Cheney's part to exhaust the legal tender in the bank of Russell & Holmes on June 1st, 1885, so that payment of the Libby notes on that day, therein, would be prevented, is evident from a recapitulation of the facts, which the proof shows to be as follows:

On May 28th, 1885, Mr. Cross the banker at Jerseyville, Ill., deposited $5,000, mostly in his National bank's bills, and inquired as to Russell & Holmes keeping a legal tender reserve.

On the afternoon of June 1st, Mr. Cheney's attorney procures an exchange of $5,000 of other currency for legal tender notes.

Later on same afternoon Mr. Cheney on checks from Mr. Cross procures as a *personal accommodation* $2,500 in legal tender money.

After he had procured this $2,500 in legal tender, he at once presents a check from the same party, Mr. Cross, for $2,500 more, and asks for legal tender currency on it, which Mr. Holmes refused to pay in such

funds, and Mr. Cheney says all right.

Soon after this he presented the Libby notes due May 28th, 1885, and *demanded* legal tender money upon them.

Upon Mr. Holmes declining at first to give him the legal tender upon these notes, he at once had his notary, whom he had come into the bank with him, or soon after, protest the notes. (Record page 34 ans. 12 and 14.)

Mr. Cheney either left town, or concealed himself, so soon that Mr. Holmes could not procure them for payment in legal tender in twenty minutes afterwards.

If this had not been Mr. Cheney's purpose he would have presented all the Cross checks at once, like a business man, as he is, does such business; and would not have first presented checks for $2,500 and asked for legal tender on them, and then, after procuring it, presented another for $2,500 and asked for legal tender upon it also.

We contend therefore that there are three reasons why a forfeiture should not be declared in this case even if Mr. Libby had failed to perform:

1. All the payments due prior to May 28th, 1885, including payment made at date of the contract, had been made by Mr. Libby's sending bank drafts for the amount. All these payments thus made had been accepted. In one case, at least, Mr. Cheney had accepted the original bank draft in payment and so

notified Mr. Libby. (Record page 15 exhibits "A" and "B" and ans. 12.) In no case prior to June 1st, 1885, did Mr. Cheney ever object to Mr. Libby's paying by bank drafts.

2. By his letters of March 19th and May 23rd, 1885, Mr. Cheney waived payment of all notes until he notified Mr. Libby of his decision as to whether he would take all the unpaid principal and make the deed, which he agreed to do after he came to Beatrice between the 1st and 10th of June. But he never gave Mr. Libby any such notice, but on the contrary, in violation of his agreement to do so, on June 1st came into said bank and in the absence of Mr. Libby, demanded legal tender money in payment of the notes due May 28th, 1885.

3. By his own conduct, Mr. Cheney, *artfully* and *purposely* prevented Russell & Holmes from paying the legal tender upon those notes, in the manner above pointed out.

III.

Examination of Appelant's Brief.

From the foregoing we contend, that, in any reasonable view of the facts proved which may be taken, it will be seen that the decree of the court below is clearly right and should be affirmed. But an examination of appellant's brief, will disclose this fact even more clearly; because every position taken in

this brief is unwarranted by the facts as shown by the record.

Let us briefly notice them in their order:

1. Appellant on the very first page of his brief contends that, "this may be called a 'legal tender case.'" Then in his statement of how the question arises leaves out of view the fact that all payments made prior to May 28th, 1885, were made with his knowledge and consent by sending bank drafts to Russell & Holmes' bank, and payment accepted either by accepting ordinary currency or the drafts themselves.

Also that by his letters of March 19th and May 23rd, 1885, he waived payment of all unpaid notes until he notified appellee as to whether he would take all the unpaid principal and make the deed.

Also that by his own conduct he artfully and purposely prevented Russell & Holmes from paying him in "legal tender" on June 1st, 1885.

Appellee does not contend that other currency than "gold" and "greenbacks" constitute legal tender money. There is no controversy in this case as to what currency is, or is not legal tender money. Such a question does not arise.

2. In his specification of errors, on page "8" of his brief, appellant complains that certain findings are erroneous; but it will be seen they are clearly sustained by the facts. He complains that the finding that appellee had deposited the mortgage with the clerk of

the court and was entitled to the deed is erroneous because it does not require appellee to place the cash payments made, within the jurisdiction of the court.

To this we reply that those cash payments, the proof shows, are placed within the reach of appellant at the very place mentioned in the contract. But in addition to this, before the entry of the decree the court required appellee to bring the entire amount of the said payments made, which came due in May 1885, 1886 and 1887, into court and deposit same with the clerk, which was done as the certificate of the clerk now on file shows.

3. Appellant contends that legal tender currency was at a premium at the time demand is alleged to have been made for same, but it will be seen by answers to questions 32 and 33 page 40 of the record that it was not. This is also shown by the very answer appellant cites.

4. On page 13 of his brief appellant quotes a letter from Russell & Holmes dated June 23rd 1885, to show, by implication, that no offer to pay in legal tender currency was made before that date.

But the court will notice that Mr. Holmes notified appellant's notary who protested the notes, on June 1st, 1885, within fifteen minutes after the demand was made, that he desired to pay the notes in *legal tender* (ques. 17 and 18 pages 34 and 35 and ques. 17 and 19 page 38 of the record.)

Also appellee wrote appellant on June 12th, 1885, that the gold was deposited for him, to pay the notes due May 28th, 1885. Appellant recived this letter. Appellant introduced it in evidence on the trial of the

ejectment case, between these parties in January, 1887, United States Court, at Lincoln. (Ques. 23 and 24 pages 19 and 20 of record.)

At the time this notice was given Mr. Cheney still held all the notes and had not attempted to declare the contract forfeited. He did not return the notes or attempt to terminate the contract until June 20th, 1885. (See exhibit "H" page 21 of record and see also Mr. Cheney's testimony on this point.)

Under all the circumstances a technical demand of payment of notes after banking or business hours had closed, (ques. 12 pages 33 and 34, ques. 11 page 37) certainly ought not to be held sufficient to work a forfeiture in this case.

5. The cases cited by appellant do not support the extraordinary position he takes in this case.

The case of *Adams vs. Hackensack* 44 *N. J. Law* 638 is a case where bonds were made payable at a particular bank, and the maker left the money (legal tender presumably) to pay same at the bank, but before the payee received the money from the bank, the bank failed, *held*, that the maker should bear the loss as the bank was not the agent of the payee. But in this case even if there was a technical demand made on third day of grace at the bank, yet within fifteen minutes thereafter the banker made an effort to pay in legal tender and the proof shows this ability and willingness to pay in such funds has continued ever since. In equity this is certainly sufficient to prevent a forfeiture.

In *Ward vs. Smith* 7 *Wall.* (*U. S.*) 447, cited on same page (15) of appellant's brief, it is held in the case

of a bond payable at a particular bank, that.

"If the obligor is at the bank at the maturity of the bond, with the necessary funds to pay it, he so far satisfies the contract that he cannot be made responsible for any future damages, either as costs of suit or interest, for delay." In this case it is also held, that,

"Where an instrument payable at a bank is lodged with the bank for collection the bank becomes the agent of the payee to receive the payment."

We do not contend that the mere making of a note payable at a particular bank, alone, without other circumstances tending to establish the fact, is sufficient to make the bank the agent of the payee. But in this case we do contend that there are two undisputed facts established by the proof, which do show that this particular bank (Russell & Holmes') was considered the agent of the payee, Mr. Cheney:

a.—This particular bank had been Mr. Cheney's agent in making collections in a great deal of business, prior to date of these notes; (ques. 3, 4 and 5 pages 32 and 33 of the record,) and this bank was designated as place of payment of these notes at Mr. Cheney's request: (ques. 34 page 22 of record) and this bank never did any business before this for Mr. Libby, the appellee (ques. 6 page 33.)

b.—By his conduct in accepting payments made up to and including the payment due May 28th, 1885, the appellant led the appellee to believe he had left the notes due May 28th, 1885, at this bank for collection and would therefore be bound by the acts of said bankers in accepting payment (ques. 9 page 14, and ques. 36, 37, 38, 39, 40, 41 and 42 pages 23, 24 and 25.)

In case of *Maynard vs. Hunt* 5 *Pick.* 240 cited by appellant on page 15 of his brief it is clearly suggested on page 243 that a tender after condition broken can be enforced in equity, but not in the proceeding by the mortgagee upon his seizing in fee etc. under his mortgage after condition broken, to oust tenant of mortgagor from posession.

In the case cited on page 17 of appellant's brief, *Stinson vs. Dousman* 20 *Howard* 461, Stinson had agreed to purchase the land for $8,000 payable in three installments. The contract was dated February 1854, the first installment was due in September 1854. Stinson was to pay all taxes after May 1853, and insure the buildings in favor of Dousman and on failure to perform, contract of sale to be void, Dousman was authorized to collect all interest due as rent. Time was made of the essence of the contract. Stinson had only paid *one dollar* of the purchase money at date of contract. Stinson entirely failed to pay the taxes or insure the property as agreed. He failed to pay the first installment of purchase money when due and on September 14th, 1854, while Stinson was still in default, Dousman notified Stinson that the contract was annulled and that he claimed the interest then due, as rent. He then brought suit for this rent. The court holds that he was entitled to this rent and simply announces the doctrine, (page 466) that,

"Where it plainly appears that the sale is conditional, and its completion is dependent upon the

fulfillment of any of the terms with punctuality, by either party, a court of equity, *in general*, will not interpose to relieve the party in default. * * * * * The defendant failed to perform either term of his contract and his answer contains no valid excuse for his neglect."

This case is altogether different from the one at bar, as will be readily seen.

On page 18 of his brief appellant contends that appellee is nowhere bound to purchase said land,—that he is simply given permission, in the contract, to purchase the land at his option. But it will be seen from the contract (see page 5 of the record) that, appellant, "contracts, bargains and agrees to sell to said second party said premises. * * * * * The purchase price of said land is eight thousand nine hundred and sixty dollars, of which payment has been made of sixteen hundred dollars at the execution of this contract. The balance is to be paid, without notice or demand therefor, in ten annual payments, at the times specified in eighteen certain promissory notes of even date herewith, signed by Jacob Libby, payable to the order of P. D. Cheney."

As suggested before in this brief, in the case of *Robinson vs. Cheney* 17 *Neb.* 673 a contract in the same language, written upon the same blank form, as this contract, was construed to be a contract of sale and not a lease. In this last case the court on page 679 says:

"While there are terms used in the instrument that would imply a lease, yet when the whole instrument is construed together, it was clearly intended as a sale and not as a lease."

On page 19 of his brief appellant cites the case of *Mo. River R. R. vs. Brickley* 21 *Kan.* 286 as an authority in his favor. But that was a case in which land worth $2,000 was sold to the purchaser for $120. The purchaser knew of the peculiar value of the land and the vendor did not. Forty dollars of the purchase price only was paid when contract was made; the balance was to be paid in two installments of $40 each on January 8th, 1877, and January 8th, 1878, respectively. Time and punctuality were made of the essence of the contract. The installment due January 8th. 1877, was not paid and on April 2d, 1877, while the purchaser was still in default, the vendor notified the purchaser that the contract was forfeited. After all this the purchaser attempted to tender payment and still compel vendor to specifically perform the contract. The court, by *Brewer, J.*, says the purchaser is not in a position to demand a specific performance on the part of the vendor under the peculiar circumstances named, but on the last page of the opinion the learned judge places his judgment largely upon the ground that it would be inequitable to take $2,000 worth of property and give it to the purchaser, (in default,) for $120.

That this case is to be distinguished from the one at bar, is also clearly evidenced by the fact that

the same judge, (Brewer, now U. S. Circuit Judge) who wrote the opinion in this case, rendered the decree appealed from in the case at bar.

6. As a sort of last resort appellant on page 17 of his brief contends that:—"It was error for the circuit court to adjudge costs against Cheney, as he has never been in default" and that "Libby's demand for a deed on Aug. 20th, 1885, of Russell & Holmes (p. 49) is not a demand on Cheney."

We certainly think the demand made on August 20th, 1885, referred to was certainly sufficient, as Mr. Cheney admits in his testimony he received notice of this demand and promptly and expressly declined to comply with it, giving copies of both letters (see page 49 of printed record.)

Besides appellee by his attorney made another demand for the deed, upon appellant personally and directly, on February 4th, 1887, which demand was promptly and expressly declined by appellant. (See pages 30 and 31 of printed record and exhibits "N" and "O.") It will be seen that the case referred to by Mr. Cheney in his letter of declination (exhibit O) is the ejectment case referred to by Mr. Libby in his testimony (ques. 24 page 20 of record.)

This suit was not commenced until February 27, 1887. As appellant refused after these demands to make the deed and appellee was compelled to bring this suit to compel specific performance of said contract by appellant, the costs certainly should be

recovered from appellant.

7. In his statement of the order of events on pages 20 and 21 of his brief appellant entirely leaves out and ignores the following:

a—The designation of the bank of Russell & Holmes as the place of payment of said notes was at the instance of, and was required by appellant.

b—Appellant's letters of March 19th and May 23rd, 1885, and the correspondence of which they are a part.

c—That appellant artfully and purposely prevented Russell & Holmes from paying him in *legal tender* on June 1st, 1885.

d—That on June 12th, 1885, appellee wrote appellant informing him the gold was deposited subject to his order at Russell & Holmes' Bank to pay the notes due, (Ques. 23 and 24 pages 19 and 20 of the record.)

e—That appellee under the contract had placed permanent improvements on the land worth $10,000.00 (ques. 43 page 25.)

f—By his conduct in accepting all payments made prior to May 28th, 1885, in drafts, appellant led appellee to believe the sending of drafts in payment was satisfactory to him.

We have thus, even at the risk of the charge of repetition, tried to point out and emphasize the real facts proved in this case. We believe when the facts are examined they will emphatically demonstrate that justice has been done by the decree in this case, and that under these facts law and equity require just such a decree and would have permitted no other to have been rendered. We deem it unnecessary to cite additional authorities to this learned court. We ask that this decree be in all things affirmed.

Respectfully Submitted.

SAMUEL P. DAVIDSON,

Solicitor for Appellee.